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Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner,*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent.*

On Writ Of Certiorari To The 169th Judicial District Court Of Bell County, Texas

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

THE OPINION BELOW

No formal written opinion was filed by the Court below in support of the judgment of criminal contempt entered against the Petitioner.

JURISDICTION

The judgment of criminal contempt against the Petitioner, dated September 28, 1973 and entered of record on October 1, 1973, is reproduced in Appendix A of the petition for certiorari at pages 27-29. The orders of the Court of Criminal Appeals of Texas and the Supreme Court of Texas denying the Petitioner's original applications for habeas corpus relief on October 11, 1973 are

reproduced in Appendix B and Appendix C of the petition for certiorari at pages 33 and 34. The filing of the petition on October 24, 1973 was timely under Rule 22(1) of the Court.

Because the contempt judgment entered by the Respondent against the Petitioner is not subject to review in any higher Texas court, the case is within the Court's certiorari jurisdiction conferred by 28 U.S.C. § 1257(3). *Stanford v. Texas*, 379 U.S. 476, 480 (1965); *Thompson v. City of Louisville*, 362 U.S. 199, 202-03 (1960).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

2. Whether an attorney may be held in contempt of court:

(a) for giving legal advice to a client involving Federal constitutional rights;

(b) in good faith and in the exercise of his professional judgment—whether right or wrong;

(c) without contumacious conduct or disrespect to the Judge; and

(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claims implicate the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to effective assistance of counsel, the Ninth Amendment residuum of individual substantive rights and the Fourteenth Amendment guarantee of due process of law.

The relevant provisions of the Constitution of the United States, the Texas obscenity statute (Article 527 of the Texas Penal Code) and contempt statute (Article 1911a of the Revised Civil Statutes of Texas) and an obscenity ordinance enacted by the City of Temple, Texas on October 19, 1972, are reproduced in Appendix A of this brief at pages 61-68.

STATEMENT OF THE CASE

On February 1, 1973 Petitioner Michael Anthony Maness, a licensed attorney admitted to practice before the courts of the State of Texas and this Court, appeared as one of the counsel of record for the Defendants in the trial of Cause Number 57,284-C, *The City of Temple, Texas v. Michael McKelva, Allen Boyer and T. C. McKelva, et al.*, an action then pending before the 169th Judicial District Court of Bell County, Texas, the Honorable J. F. Clawson presiding. In this suit the City of Temple, as Plaintiff, sought a permanent injunction under section 13 of Article 527 of the Texas Penal Code[1] to

1. The comprehensive revision and recodification of the Texas Penal Code which became effective on January 1, 1974 did not carry forward section 13 or any equivalent provision authorizing an injunction against the sale, display or distribution of obscene material. The State Bar Revision Committee's comment explaining this omission characterized the injunctive remedy as "awkward." Committee Comment (§ 43.23), *Final Draft of a Proposed Revision of the Texas Penal Code* (October, 1970).

restrain the Defendants from selling allegedly obscene matter in alleged violation of Article 527 and the criminal provisions of a virtually identical municipal obscenity ordinance under which Defendants Michael McKelva and Allen Boyer had previously been tried and convicted on January 24, 1973 (A. 15-17).

On January 30, 1973, two days before the trial of the City's application for a permanent injunction, Michael McKelva was served with a subpoena duces tecum (A. 2-4), directing him to produce fifty-two named magazines before the 169th Judicial District Court at 9:00 a.m. on February 1, 1973 and to appear before the Court at that time to give testimony as a witness at the trial. The subpoena identified the magazines only by title, without further description of any sort, and was issued by the Clerk of the Court at the request of William T. Wilson, counsel and City Attorney for the Plaintiff City of Temple.

Prior to the trial the Petitioner's co-counsel, Karl A. Maley, filed on Michael McKelva's behalf a timely motion to quash the subpoena (A. 4-6), asserting in the motion that compulsory production of the magazines pursuant to court process would contravene Mr. McKelva's privilege against self-incrimination. The motion to quash was thereafter orally argued before the Court at the commencement of the trial on February 1, 1973, after counsel for both sides had stipulated in open court that Mr. McKelva did not possess or have access to five of the fifty-two publications named in the subpoena (A. 7-8).

With respect to the remaining forty-seven magazines, as counsel for Mr. McKelva, the Petitioner urged in his argument before the Court on the motion to quash the subpoena that the publications in question dealt "explicitly

with acts of a sexual nature" (A. 8) and that, particularly in view of the criminal prosecutions that had previously been initiated against Mr. McKelva by the City of Temple, production of any of the magazines under the compulsion of a subpoena duces tecum would entail a substantial possibility of self-incrimination (A. 9).

Following the arguments of counsel, without assigning any reasons for his action, Judge Clawson overruled the motion to quash the subpoena (A. 15), after which counsel for both sides stipulated in open court that Michael McKelva and Allen Boyer had previously been convicted in the Municipal Court of the City of Temple, Texas in seven criminal cases involving the sale of allegedly obscene material, which were then on appeal to the County Court for a trial *de novo* (A. 15-17). The seven magazines providing the basis for these criminal prosecutions were purchased from the Defendants by officers of the Temple Police Department, and were subsequently introduced into evidence, without objection, during the trial on the injuction. None of these seven titles was among those listed in the subpoena duces tecum.

Michael McKelva was then called by counsel for the Plaintiff to testify as a witness on behalf of the City, and the following transpired:

> "BY MR. WILSON:
>
> Q. State your name and occupation to the Court, please.
>
> A. My name is Michael McKelva. I live at 526 Wolf Street in Killeen, Texas. I am the operator of Mike's News in Temple, Texas.
>
> Q. And is that Mike's Newsstand at 118-A South First Street?
>
> A. Yes, sir, it is.
>
> Q. Mr. McKelva, were you served with a sub-

poena requesting you to bring certain magazines, certain titled magazines to Court today?

A. Yes, sir, I was.

Q. And do you have those with you here today?

A. Sir, under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.

Q. Do you recall the day when you were served with a copy of this subpoena?

A. Yes, sir, I do.

Q. And what was that day?

A. I believe that was day before yesterday.

Q. Did you at that time have in your possession the magazines listed in the subpoena?

A. Under the advice of Counsel, I plead the Fifth.

Q. Are you saying to the Court then that you did not bring those into Court today, the magazines listed in that subpoena?

A. Under the advice of counsel, I refuse to answer on the grounds that it may tend to incriminate me.

MR. WILSON: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. WILSON: Your Honor, at this time, in response to the answers to the questions by Mr. McKelva as to the subpoena, a subpoena which was issued in this cause, I would ask the Court to instruct the Defendant, Michael McKelva, to produce the magazines listed in the subpoena within a reasonable time and if he refuses to hold him in contempt of Court." (A. 17-18)

Following a discussion between the Court and counsel with regard to the procedural adequacy of the subpoena and the tender of costs of production and witness fees, Judge Clawson determined that Mr. McKelva would be

permitted approximately two hours to secure the forty-seven magazines and to produce them in court that afternoon (A. 1, 18-20). The City then continued with the presentation of its evidence.

Immediately prior to the noon recess, Judge Clawson repeated his earlier instruction that Mr. McKelva was to respond to the subpoena by one o'clock that afternoon, and the defense acknowledged that it had understood the instruction (A. 20).

Following the noon recess, Michael McKelva was again called to the witness stand by counsel for the City, and again he refused to produce the forty-seven magazines (A. 21-22). Mr. Wilson then offered into evidence an affidavit establishing the tender of the witness fee, after which the following transpired:

> "THE COURT: Do you have any questions that you want to ask this witness at this time?
>
> MR. MANESS: Your Honor, if I might, I would like to ask the witness one question.
>
> THE COURT: All right.
>
> MR. MANESS: Mr. McKelva, are you refusing to produce the 47 magazines contained in the subpoena solely because you believe that the production of such magazines would entail a substantial possibility of self-incrimination?
>
> A. Yes, sir, I do.
>
> MR. MANESS: That is all I have, Your Honor.
>
> THE COURT: You may stand down, Mr. McKelva." (A. 22-23)

Judge Clawson then found Michael McKelva to be in contempt of court and held, over the Petitioner's objection,

that the witness's failure to respond to the subpoena would be regarded as an admission that the publications named in it were obscene (A. 23-25). The Court deferred the imposition of punishment against Mr. McKelva until the conclusion of the trial, and the City continued with the presentation of its evidence.

The testimony of Sergeant Vernon McKenzie, an officer of the vice and narcotics division of the Temple Police Department, revealed that the titles of the magazines named in the subpoena had been obtained by the Sergeant during the course of his investigation of Mr. McKelva's newsstand on January 4, 1973. At that time the Sergeant made a written list of those publications that he suspected were displayed in violation of the Temple obscenity ordinance (Tr. 109-110). On cross-examination he testified that he possessed no independent recollection by which he could identify any of the magazines whose titles he had listed, that he had viewed only the partially concealed covers of the magazines and not their contents, and that he could not describe the cover of any particular magazine (A. 25-26).

No other evidence relating to the specific character, identity or description of the forty-seven magazines was introduced during the course of the trial. No evidence established the location of the magazines either on the date of trial or on the date Mr. McKelva was served with the subpoena duces tecum.

At the conclusion of the trial on February 2, 1973, Judge Clawson on his own motion recalled Michael McKelva to the witness stand, and the following transpired:

"THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

THE COURT: Does either Counsel have any questions that they want to ask this witness?

MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the 47 magazines in question, whether or not under those circumstances he would produce the magazines?

A. I would." (A. 27)

The Court then entertained the closing arguments of counsel and, after a short recess, granted the City's application for a permanent injunction against the exhibition, display, sale or offering for sale of the seven magazines that had been introduced into evidence, the forty-seven magazines named in the subpoena (which the Court found to be obscene "by admission of counsel") and "any other publication that meets the definition of obscenity" prescribed by Article 527 of the Texas Penal Code (A. 28-29). At the same time the Court adjudged Michael McKelva and his trial attorneys, the Petitioner and Karl A. Maley, to be in contempt of court, imposing

a fine of $200.00 and a sentence of confinement for ten days in the Bell County Jail against each of them (A. 29).

After Mr. Maley had excepted to the ruling of the Court and given oral notice of appeal, the following transpired:

> "THE COURT: Mr. Maley, I want to point out to you that this Court has been most reluctant to find counsel in contempt. As a matter of fact this [is] the first time in the history of this Court that I have ever adjudged an attorney to be in contempt of this Court but I find this Court totally frust[r]ated at the attitude of Counsel in denying the access to the evidence which was contained in the subpoena duces tecum.
>
> This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it, on the admissibility of that evidence.
>
> I have found you in contempt because you have usurped the authority of this Court.
>
> You are familiar with the statutes of the State of Texas which give you a hearing on this matter. If you desire to be released on personal bond there is a statutory provision if you desire to file a motion and you will be rel[e]ased on bond and this matter will be set for hearing before another Judge, who will be appointed by the administrative Judge of this District.
>
> MR. MANESS: Your Honor, may I be heard in my own behalf on one point?
>
> THE COURT: Yes, sir.
>
> MR. MANESS: If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where Counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather

what we have is where there is a philosophical difference between Counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case.

THE COURT: Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it. Counsel himself has admitted that Defendant is in possession of these items, denying the ownership of them very carefully but admitting possession of them. You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court.

This Court is offended by your ruling, gentlemen. I am imposing the punishment as previously announced, ten days in jail and a two hundred dollar fine in each case, which is subject to your motion if you desire to file one.

MR. MANESS: Your Honor, on my own behalf, and on Mr. Maley's account, I apologize to the Court. I certainly want to express to this Court my own position and that is that it was not our intention or our purpose to offend the Court, and in that respect we apologize." (A. 31-32).

Michael McKelva was summarily jailed (A. 33). As officers of the Court the Petitioner and Mr. Maley were permitted by Judge Clawson to post a personal recognizance bond in order to secure their release pending trial of their guilt or innocence before a different District Judge in accordance with the provisions of Article 1911a, section 2(c) of the Revised Civil Statutes of Texas. Several days later the Court entered a formal written judgment, reproduced in Appendix A of the petition for certiorari at pages 30-32, finding Michael McKelva in

contempt for his disobedience of the subpoena and also finding the attorneys in contempt for "advising and counseling" their client's disobedience of the subpoena.

On February 2, 1973, the date on which Michael McKelva was initially confined for contempt by Judge Clawson, the Supreme Court of Texas denied an original application for habeas corpus relief filed by the Petitioner on Mr. McKelva's behalf "pending further information to complete the record." The writ was finally denied by that Court on February 5, 1973.

On February 8, 1973 the Petitioner filed an application for Federal habeas corpus relief on Michael McKelva's behalf in the United States District Court for the Western District of Texas, Waco Division. The Court immediately entered an order setting an expedited hearing on the merits of the case and directing the Sheriff of Bell County, Texas to appear by counsel at the hearing to show cause why the writ should not be granted and Mr. McKelva ordered discharged from confinement.

At 10:00 a.m. on February 8, 1973 Judge Clawson ordered Michael McKelva released from custody "for good behavior" and remitted the remaining three days of the jail sentence and the entirety of the $200.00 fine (A. 2). Mr. McKelva's Federal habeas corpus action was thereafter dismissed for mootness.[2]

By letter Judge Clawson also notified the Honorable Herman Jones, presiding judge of the Third Administra-

2. Although the orders entered in the collateral habeas corpus proceedings involving Michael McKelva were not certified and transmitted as part of the original record in this cause, they are properly subject to judicial notice by the Court, *Brown v. Board of Education*, 344 U.S. 1, 3 (1952); *New York Indians v. United States*, 170 U.S. 1, 32 (1898), and accordingly are reproduced in Appendix B of this brief at pages 69-73.

tive Judicial District of Texas, that the attorneys had been adjudged in contempt of court, that they had requested trial before a different District Judge in accordance with Article 1911a, and that they had been released on their own recognizance. Judge Jones promptly appointed the Honorable James R. Meyers, presiding judge of the 126th Judicial District Court of Travis County, Texas and the Respondent herein, to preside by special designation at the contempt trial, which was held in the courtroom of the 169th Judicial District Court in Belton, Texas on May 11, 1973.

At that trial a representative of the Attorney General of Texas appeared in support of the contempt judgment against the attorneys at the request of Judge Jones. By agreement of counsel for both sides in open court, with the concurrence of Judge Meyers, the case was tried exclusively upon the basis of the record of the trial before Judge Clawson; no additional testimony or other evidence was presented (A. 34-37).

With respect to the merits of the contempt judgment, the attorneys advanced two distinct defenses in their trial before Judge Meyers:

First, they asserted that Judge Clawson's order to produce the forty-seven magazines demanded by the subpoena duces tecum had been altogether void in view of Michael McKelva's legitimate invocation of the Fifth Amendment privilege against self-incrimination, thereby precluding a determination that advice to resist the subpoena amounted to a contempt of court (Tr. 11-12). Opposing counsel agreed that the judgment of contempt could not be sustained if the Fifth Amendment privilege had been properly claimed (A. 37).

Secondly, regardless of whether Mr. McKelva's assertion of the Fifth Amendment privilege were ultimately sustained, the attorneys argued that involuntary production of the forty-seven magazines pursuant to the subpoena would have risked the irrevocable and irretrievable surrender of a fundamental constitutional right in the absence of any effective judicial remedy for testing the legality of Judge Clawson's order prior to the time that compliance was demanded, and that under these circumstances traditional conceptions of an attorney's professional obligation to his client would dictate and justify advising resistance to the subpoena (Tr. 53-55).

Since the record before the Court reflected only that Michael McKelva had refused to produce the forty-seven magazines "on advice of counsel," the attorneys also suggested that the "advice" might have consisted of no more than a legal opinion of Mr. McKelva's rights under the Fifth Amendment. Judge Meyers rejected this interpretation and concluded that the attorneys had actually advised their client not to produce the magazines (A. 37-40).[3]

At the conclusion of the trial Judge Meyers indicated that he was not prepared to rule on the matter immediately and requested counsel for both sides to submit additional legal memoranda on the questions of law involved. Following the adjournment of the proceedings, counsel promptly complied with the Court's request.

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3. In order to resolve conclusively any possible doubt on this point, the Petitioner admits that he advised Mr. McKelva to avoid the risk of involuntarily surrendering his rights under the Fifth Amendment by refusing to produce the magazines, after first explaining to his client the available legal alternatives involved and the possible legal consequences that might have resulted from adopting any one of them.

On September 28, 1973 Judge Meyers signed the judgment of contempt reproduced on pages 27-29 of the petition for certiorari, affirming the contempt judgment entered against the attorneys by Judge Clawson but assessing fines of $500.00 against each of them in lieu of the punishment previously imposed. The September 28 judgment also provided that the fines were to be paid to the Clerk of the 169th Judicial District Court not later than 12 o'clock noon on October 12, 1973, a procedure designed by Judge Meyers to permit the attorneys to secure further appellate review of his decision without being forced to undergo actual physical imprisonment because of their failure to pay the fines (A. 40).

On October 11, 1973, after being advised that both the Court of Criminal Appeals of Texas and the Supreme Court of Texas had declined to review the validity of the contempt judgment on its merits, Judge Meyers signed an order permitting the attorneys to remain enlarged on their personal recognizance, despite their failure to pay the fines, in order to permit further avenues of relief to be exhausted. (A. 41-42).

The Petitioner's co-counsel, Karl A. Maley, then filed an application for the writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division, on October 25, 1973, one day after the filing of the petition for certiorari in this cause. On the same day Judge Meyers signed a second order continuing the attorneys on their personal recognizance until the conclusion of these proceedings, and further providing that if either proceeding terminated in a final order or judgment having the effect of upholding the judgment of contempt the attorney involved would be ordered to surrender himself to the custody of the Sheriff of Bell County, Texas until the $500.00 fine had been paid. (A. 43-44).

On December 20, 1973 the United States District Court entered a seven-page memorandum opinion and order granting Mr. Maley's application for habeas corpus relief and directing that he be relieved of all restraint imposed by the contempt judgment entered against him by Judge Meyers.[4] The District Court's decision was appealed to the United States Court of Appeals for the Fifth Circuit, where the case was docketed as Number 74-1619, *Maley v. Meyers.* The Fifth Circuit has stayed further proceedings in the *Maley* case in anticipation of the Court's decision in the present case.

The petition for certiorari in this cause was granted by the Court on April 15, 1974.

SUMMARY OF THE ARGUMENT

This case involves the fundamental right of a lawyer to give professional advice to his client, and the right of the client to accept it, subject to whatever legal sanctions may become available against the client, without fear that the lawyer's independence will be chilled by the possibility that he may be summarily punished if the advice proves incorrect. In this context, the advice given here—to exercise Fifth Amendment rights—is actually subsidiary.

However, the Petitioner has fully briefed the correctness of the advice given to demonstrate that it was indeed sound and fully authorized by precedent.

Unlike many of the contempt cases involving attorneys that have previously been considered by the Court,[5] this

4. The unreported memorandum opinion, order and judgment are reproduced in Appendix C of this brief at pages 74-82.

5. For example, *Ungar v. Sarafite,* 376 U.S. 575 (1964); *Offutt v. United States,* 348 U.S. 11 (1954); *Sacher v. United States,* 343 U.S. 1 (1952); *Cooke v. United States,* 267 U.S. 517 (1925); *Ex parte Terry,* 128 U.S. 289 (1888).

one is not colored in the least degree by any disrespectful, insulting, antagonistic or disruptive behavior or language by counsel in the presence of the Trial Judge. The entire record uniformly reflects that throughout the course of the proceedings neither the lawyers nor the Court manifested on any occasion the slightest animosity, anger or discourtesy but, on the contrary, consistently displayed toward each other an undisturbed and uninterrupted attitude of respectful intellectual equality. Until Judge Clawson stated at the conclusion of the trial that he was finding the attorneys in contempt, nothing whatever had transpired to suggest that the Court would ultimately view the Petitioner's advice to his client in that light.[6]

Nor is this a situation in which the Petitioner was adjudged in contempt for having himself violated any order or decree of the Court.[7] At no time during the trial did Judge Clawson order either of the defense attorneys to produce the forty-seven magazines or to advise their client to produce them.

Rather, this is a case in which an attorney has been found in criminal contempt of court and ordered to pay a $500.00 fine for having advised his client to assert the

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6. The absence of any prior warning that the Court would punish the Petitioner's advice to his client as a criminal contempt provides at least an arguable basis for reversing the judgment for lack of fair notice. *Eaton v. City of Tulsa*, 42 U.S.L.W. 3538 (March 25, 1974) (concurring opinion by Mr. Justice Powell); *cf. Ungar v. Sarafite*, 376 U.S. 575, 585 (1964); *Sacher v. United States*, 343 U.S. 1, 5 (1952).

However, the Petitioner expressly disclaims reliance on such a theory, essentially because his advice to his client would not have been different even if he had been apprised beforehand of Judge Clawson's inclination to regard it as contemptuous.

7. For example, *Nilva v. United States*, 352 U.S. 385 (1957); *Fisher v. Pace*, 336 U.S. 155 (1949); *Hickman v. Taylor*, 329 U.S. 495 (1947).

Fifth Amendment privilege against self-incrimination. As suggested by the petition for certiorari, it appears to have no precedent in the constitutional history of this country or in the recorded history of the Anglo-American common law.

The judgment of contempt must be reversed and the Petitioner ordered discharged for the following reasons:

First, it is axiomatic that a witness cannot be adjudged in contempt of court merely for having lawfully invoked the Fifth Amendment privilege against self-incrimination. *Quinn v. United States,* 349 U.S. 155 (1955); *Hoffman v. United States,* 341 U.S. 479 (1951); *Blau v. United States,* 340 U.S. 159 (1950); *cf Gelbard v. United States,* 408 U.S. 41 (1972).[8] By implication an attorney must necessarily be immune from punishment for contempt simply for having advised his client to assert in a lawful manner a fundamental right guaranteed by the Constitution of the United States. Accordingly, if Judge Clawson's order directing compliance with the subpoena to produce the forty-seven magazines violated Michael McKelva's Fifth Amendment privilege, the contempt judgment against the Petitioner obviously cannot stand.

In view of the witness's legitimate reliance on the privilege against self-incrimination, Judge Clawson's order to produce the magazines was manifestly unconstitutional. The characterization of the proceedings as "civil" in na-

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8. On page 7 of the brief in opposition to the petition for certiorari, the Respondent advances the startling thesis that "the invalidity of a judicial order [directing compulsory self-incrimination] does not vitiate a contempt judgment."

This inexplicable misunderstanding and misapplication of the Court's decisions in such cases as *United States v. United Mine Workers,* 330 U.S. 258 (1947) and *Walker v. City of Birmingham,* 388 U.S. 307 (1967) is explored in this brief in connection with the second question presented for review.

ture has not the slightest bearing on the question, *Kastigar v. United States,* 406 U.S. 441, 444–45 (1972); *McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924), and on this record there can be no argument that the privilege was not invoked in a timely or procedurally sufficient manner. *Quinn v. United States,* 349 U.S. 155, 164 (1955); *cf. United States v. Kordel,* 397 U.S. 1, 5 (1970). The danger of involuntary self-incrimination was real and appreciable,[9] not remote, speculative or insubstantial, *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S.. 472, 478 (1972); *Brown v. Walker,* 161 U.S. 591, 599-600 (1896), thereby negating any possible suggestion that compliance with the subpoena could not possibly have had a tendency to incriminate the witness. *Hoffman v. United States,* 341 U.S. 479, 488 (1951); *United States v. Burr,* F. Cas. No. 14692e (C.C. Va., 1807). And, of course, the Court has traditionally recognized that not only testimonial but also documentary evidence sought by subpoena or equivalent court process is within the scope of the privilege, *United States v. Saline Bank,* 1 Pet. 100, 104 (1828); *Boyd v. United States,* 116 U.S. 616 (1886); *Schmerber v. California,* 384 U.S. 757, 764 (1966), and that concepts of ownership or legal title do not determine the privilege's availability. *Couch v. United States,* 409 U.S. 322, 330-34 (1973); *Perlman v. United States,* 247 U.S. 7, 15 (1918).

Since the magazines were themselves inherently testimonial or communicative in character, it cannot be plausibly maintained that compliance with the subpoena duces tecum would have been comparable to the production of identifying physical characteristics involving "no

9. Michael McKelva was neither offered nor granted immunity from criminal prosecution in exchange for the production of the forty-seven magazines.

compulsion of the accused to give evidence having testimonial significance." *United States v. Wade,* 388 U.S. 218, 222 (1967); *United States v. Dionisio,* 410 U.S. 1 (1973); *United States v. Mara,* 410 U.S. 19 (1973); *cf. California v. Byers,* 402 U.S. 424 (1971). The publications admittedly were subpoenaed only for the purpose of accomplishing the disclosure of their communicative content; requiring production of them was no different in principle from demanding that the witness describe in detail under oath the communications they contained. *Ballmann v. Fagin,* 200 U.S. 186, 195 (1906).

Conceding by implication that all of these considerations might otherwise have justified Michael McKelva's invocation of the Fifth Amendment privilege, the Respondent nevertheless finds decisive significance in the fact that the magazines were previously displayed for commercial distribution. The theory is constructed on the twin premises that (i) the protection of the privilege extends only to the compulsory disclosure of "private" (in the sense of "confidential") documentary evidence, and (ii) that entitlement to the privilege was "waived" by the previous commercial display of the publications.

The problem with the Respondent's position arises almost entirely from the indefensibility of its assumptions. None of the Court's previous decisions suggests that Fifth Amendment consequences are contingent "upon the degree of privacy which attended the creation or maintenance of particular [documents] or upon the intimacy of the information which they contained." *United States v. Cohen,* 388 F.2d 464, 471 (9 Cir., 1967). On the contrary, the Court's periodic references to "private documents" have consistently been employed to exclude from the scope of the privilege's protection the type of

documentary evidence held in a *representative* ("public") capacity, *Shapiro v. United States*, 335 U.S. 1, 17 (1948); *Davis v. United States*, 328 U.S. 582, 589-90 (1946); *United States v. White*, 322 U.S. 694, 699 (1944); not to limit the constitutional prohibition against self-incrimination to the involuntary disclosure of communicative evidence characterized by some nebulous degree of confidentiality.

Even apart from the practical impossibility of formulating any workable distinction between "confidential" and "non-confidential" evidence, the Respondent's theory has the additional disadvantage of being historically insupportable. Unlike the Fourth Amendment, the origins of which reflect almost exclusive concern for interdicting unwarranted official assaults on individual privacy, the Fifth Amendment serves the additional and entirely distinct function of shielding a person from the hazards of *any sort* of testimonial production involving potentially self-incriminatory disclosures. Consequently, considerations of privacy that are frequently relevant in delineating the contours of the Fourth Amendment, *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968); *Katz v. United States*, 389 U.S. 347, 351 (1967), are necessarily subordinate or altogether irrelevant in a Fifth Amendment context, where the fundamental question is whether the State has utilized physical or moral compulsion in an effort to secure involuntary, potentially incriminating communications from an unwilling victim, *Couch v. United States*, 409 U.S. 322, 327 (1973); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *United States v. White*, 322 U.S. 694, 698 (1944). Such compulsion is constitutionally illegitimate regardless of whether the information extracted is characterized as "confidential" or not.

The suggestion of "waiver" is equally unpersuasive. This Court has traditionally declined to infer acquiescence in the loss of fundamental constitutional rights from mere inaction or a silent record, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1969), and in an equivalent Fifth Amendment environment it has already decisively rejected the argument that "an inference of antecedent choice" will effectively abrogate the privilege's protection, *Marchetti v. United States*, 390 U.S. 39, 51-52 (1968), just as it has found intolerable the suggestion that the exercise of one constitutional right may result in the surrender of another. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

Moreover, the "waiver" theory disregards the critical circumstance that the very *act* of complying with a subpoena duces tecum demanding tangible physical evidence *by itself* entails testimonial or communicative consequences to the extent that such production necessarily verifies or authenticates the evidence produced as that demanded by the subpoena. Accordingly, a previous commercial display of the forty-seven magazines could not "waive" the testimonial disclosure implicit in the fact 1961); McCormick, *Evidence* § 126 (2nd ed. 1972).

Virtually all State and Federal courts have thus far assumed almost as a matter of course that resistance to court process seeking an involuntary production of allegedly obscene material is justified under the Fifth Amendment. *Smith v. Fair*, 363 F. Supp. 1021 (N.D. Ohio, W.D., 1973); *State v. Eros Cinema, Inc.*, 262 La. 706, 264 So. 2d 615, 619 (1972). The only decision to the contrary thus far discovered by the Respondent is distinguishable on its facts from the present case, frankly predicated on the discredited "waiver" approach and grounded ultimately

on the unfortunate misconception that an individual who asserts the Fifth Amendment privilege must necessarily be guilty of a criminal offense, a myth this Court has sought consistently to dispel. *Slochower v. Board of Higher Education*, 350 U.S. 551, 557-58 (1956); *Ullman v. United States*, 350 U.S. 422, 426 (1956).

Aside from the question of whether Michael McKelva was actually entitled to invoke the Fifth Amendment privilege to resist production of the forty-seven magazines, the contempt judgment against the Petitioner must still be reversed for an even more fundamental reason: because it is constitutionally intolerable that an attorney should be adjudged in contempt of court merely for having advised his client to assert the privilege against self-incrimination.

Obviously the Petitioner is not irresponsibly arguing on behalf of himself and other members of the Bar for an unrestricted right to counsel resistance to the orders and processes of the courts. Respect for the rule of law and the established role of the judiciary as the referee of legal disputes ordinarily dictates that the orders of any Judge must be obeyed until they are revoked, modified or set aside by a higher court in an orderly manner. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

But neither the Petitioner nor the Court has ever been committed to the authoritarian philosophy that disobedience of a court order is *never* justified under *any* circumstances. When fundamental constitutional rights have been threatened by unreviewable judicial decrees, the Court has never hesitated to set aside contempt judgments resulting from resistance to them. *Johnson v. Virginia*, 373 U.S. 61 (1963); *Hamilton v. Alabama*, 376 U.S. 650 (1964). For the same reasons a witness has always been

accorded the option of testing his entitlement to the Fifth Amendment privilege in a higher forum by refusing to submit to a Trial Judge's directive that he forego it; as a practical matter, disobedience of such an order constitutes the *only* truly effective method for preserving the privilege intact. *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951); *United States v. Dickinson,* 465 F.2d 496, 512 (5 Cir., 1972).

Judge Clawson's remarkable assertion that Michael McKelva was obligated to produce the magazines and *thereafter* to assert his Fifth Amendment privilege by seeking to suppress their use as evidence in any resulting criminal prosecution (A. 32) is contrary to more than a century and a half of precedent, *Hoffman v. United States,* 341 U.S. 479, 488 (1951); *United States v. Burr,* F. Cas. No. 14692e (C.C. Va., 1807), and logically implies that (i) no witness can ever continue to assert the privilege after a Judge's rejection of it, and (ii) that the Court's long line of decisions dealing with immunity statutes, culminating in *Kastigar v. United States,* 406 U.S. 441 (1972) and *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472 (1972) is superfluous because *no* grant of immunity is ever required.

The Judge's position simply overlooks the fact that the exclusionary rule of *Mapp v. Ohio,* 367 U.S. 643 (1961) and *Miranda v. Arizona,* 384 U.S. 436 (1966) is the necessary consequence of the judiciary's practical inability to interdict violations of Fourth and Fifth Amendment rights *before they occur.* Exclusion of illegally obtained evidence after a criminal prosecution has already been initiated on the basis of it is hardly the functional equivalent of a before-the-fact grant of use and derivative use im-

munity under the standards prescribed by *Kastigar* and *Zicarelli.*

From this perspective Michael McKelva's compliance with the subpoena would certainly have risked an irretrievable surrender of Fifth Amendment rights, resulting exclusively from the Trial Court's misconception of the law, in circumstances where effective judicial review of the suspect order was not available prior to the time that compliance was demanded. An individual in this predicament is constitutionally entitled to encouragement and advice to resist the demand, and his lawyer is constitutionally entitled to give it to him, as a necessary consequence of the complex of values inherent in the Fifth, Sixth, Ninth and Fourteenth Amendments. *In re Watts,* 190 U.S. 1, 29 (1903); *Miranda v. Arizona,* 384 U.S. 436 (1966); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The record in this case is wholly devoid of the slightest evidence of contumacious intent, *In re Brown,* 454 F.2d 999, 1007 (D.C. Cir., 1971); *United States v. Seale,* 461 F.2d 345, 367 (7 Cir., 1972), and thus far there has been not the slightest suggestion that the Petitioner was not acting in absolute and unassailable good faith. His conduct was sanctioned, not condemned, by the Code of Professional Responsibility of the American Bar Association. All of these considerations lead inevitably to the conclusion that, when confronted with a Judge's hostility or insensitivity to the exercise of the Fifth Amendment privilege, an attorney owes allegiance to his client's constitutional rights, not to the court order that threatens them.

In the last analysis this case has arisen because of Judge Clawson's mistaken conviction that his decision

on the matter was final and that Michael McKelva and his attorneys were obligated to abide by it. That supposition can never be accepted as long as this Court, rather than the 169th Judicial District Court of Bell County, Texas or some other subordinate tribunal, remains the ultimate arbiter of constitutional disputes and the final definitive authority on the scope of protection afforded by the Bill of Rights. *Marbury v. Madison*, 1 Cranch 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958).

ARGUMENT

1. The Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

The sole argument advanced before Judge Clawson to justify the City's demand for the production of the forty-seven magazines despite Michael McKelva's claim of the privilege against self-incrimination was premised on the assertion that the trial was merely a "civil" proceeding and, by implication, that the privilege was unavailable in such a context (A. 12). On page 5 of the brief in opposition to the petition for certiorari, the Respondent apparently attaches a similar mystical significance to that characterization. It is, of course, altogether irrelevant.

The exercise of the privilege in "civil" proceedings has been sustained for almost a century and a half. *United States v. Saline Bank,* 1 Pet. 100, 104 (1828). The Fifth Amendment "can be asserted in *any* proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory; and it protects against *any* disclosure which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States,* 406 U.S. 441, 444-45 (1972) (emphasis added). Any veiled suggestion to the contrary has been eclipsed by history.[10]

Likewise, the record provides no support for an argument that Michael McKelva did not invoke the privilege in a timely, articulate, procedurally effective manner. "As everyone agrees, no ritualistic formula is necessary to invoke the privilege." *Quinn v. United States,* 349 U.S. 155, 164 (1955); *Emspak v. United States,* 349 U.S. 190, 194 (1955). The witness appeared in court as commanded by the subpoena, assumed the witness stand and readily answered all questions that did not call for potentially self-incriminatory responses. He explicitly invoked the Fifth Amendment in declining to answer specific questions regarding the forty-seven magazines (A. 17-18) and in declining to produce them pursuant to the subpoena (A. 22-23), stating clearly and unequivocally that he would have done so if his attorneys had advised him that production would not have endangered his privilege against self-incrimination (A. 27). Prior to the trial the defense filed a timely motion to quash the subpoena (A. 4-6), and throughout the course of the

10. *Boyd v. United States,* 116 U.S. 616 (1886); *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *McCarthy v. Arndstein,* 266 U.S. 34, 40 (1924); *Quinn v. United States,* 349 U.S. 155, 161 (1955); *Watkins v. United States,* 354 U.S. 178, 195-96 (1957).

trial that motion was continually reurged for the Trial Judge's reconsideration (Tr. 24, 28-29, 82-83). Under such circumstances it cannot be suggested that the Court was not fairly and thoroughly apprised of the witness's position in the matter.

Likewise, the situation was not conceivably one in which the real and appreciable danger of self-incrimination was open to question. The Petitioner readily conceded that all of the publications dealt "explicitly with acts of a sexual nature" (A. 8), a fact established quite plainly by their titles alone (A. 2-4). Coupled with the City's previous prosecution and conviction of the witness for the sale of obscene material and its own position that the communicative content of the magazines was obscene in a constitutional sense, the circumstances lead inevitably to the conclusion that the privilege was not rendered inoperative because the hazards of testimonial compulsion were remote, speculative or insubstantial.[11]

In any event the Court has never demanded that the witness demonstrate the potentially self-incriminatory consequences of producing testimony or documentary evidence; a reasonable apprehension that the evidence produced will provide a subsequent basis for criminal prosecution is sufficient. Thus, the invocation of the privilege must invariably be sustained unless it is *"perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have [a] tendency" to incrim-

11. *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 478 (1972); *Leary v. United States,* 395 U.S. 6, 16 (1969); *Rogers v. United States,* 340 U.S. 367, (1951); *Mason v. United States,* 244 U.S. 362, (1917); *Heike v. United States,* 227 U.S. 131, 144 (1913); *Twining v. New Jersey,* 211 U.S. 78, 91 (1908); *Brown v. Walker,* 161 U.S. 591, 599-600 (1896).

inate. *Hoffman v. United States,* 341 U.S. 479, 488 (1951) (emphasis added); *Arndstein v. McCarthy,* 254 U.S. 71, 73 (1920); *United States v. Burr,* F. Cas. No. 14692e, p. 40 (C.C. Va., 1807). Plainly that rigorous standard was not satisfied in the circumstances of the present case.

The fact that the testimonial disclosure would have involved documentary evidence, rather than oral testimony, likewise did not exclude production of the forty-seven magazines from the scope of the privilege. The constitutional prohibition against compulsory self-incrimination resulting from compliance with a subpoena duces tecum or equivalent court process has been recognized since *United States v. Saline Bank,* 1 Pet. 100, 104 (1828) and *Boyd v. United States,* 116 U.S. 616, 630 (1886). It is now beyond argument that "the protection of the privilege reaches an accused's communications, *whatever form they may take,* and the compulsion of responses which are also communications, *for example, compliance with a subpoena to produce one's papers.*" *Schmerber v. California,* 384 U.S. 757, 763-64 (1966) (emphasis added); *Couch v. United States,* 409 U.S. 322, 329 (1973). Obviously the forty-seven magazines were as much Michael McKelva's "communications" for purposes of the Fifth Amendment as they were in connection with their entitlement to presumptive protection under the First. *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Marcus v. Search Warrants,* 367 U.S. 717 (1961); *cf. New York Times Company v. United States,* 403 U.S. 713 (1971).

Finally, the fact that Mr. McKelva disclaimed *ownership* of the publications (A. 8) did not preclude his

exercise of the privilege in light of the fact that his *possession* of them was undisputed. "To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line." *Couch v. United States*, 409 U.S. 322, 330 (1973). Both Article 527 of the Texas Penal Code and the obscenity ordinance enacted by the City of Temple imposed criminal sanctions against possession of obscene material, not the ownership of it. Particularly in this situation, "the criterion of immunity [is] not the ownership of property but the 'physical or moral compulsion' exerted." *Perlman v. United States*, 247 U.S. 7, 15 (1918); *Johnson v. United States*, 228 U.S. 457 (1913).[12]

Of course, not every compelled production of potentially incriminating evidence is outlawed by the Fifth Amendment. For example, the extraction of blood for the purpose of laboratory analysis even over the donor's objecton does not contravene the privilege, *Schmerber v. California*, 384 U.S. 757 (1966); nor does the involuntary appearance of a suspect in a lineup for identification purposes, *United States v. Wade*, 388 U.S. 218 (1967); nor does the taking of voice samples, *United States v. Dionisio*, 410 U.S. 1 (1973); or handwriting exemplars, *United States v. Mara*, 410 U.S. 19 (1973); *Gilbert v. California*, 388 U.S. 263 (1967); or fingerprints, *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir., 1963).

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12. In his brief before the Fifth Circuit in the *Maley* case, the Respondent relies in part on Rule 206 of the American Law Institute's Model Code of Evidence (1942) in support of the contention that ownership determines entitlement to the privilege.

Whatever the credentials of its architects as constitutional authorities, the antiquated Model Code is worthless as a guide to the contemporary dimensions of the Fifth Amendment privilege. Compare Rule 233 of the Model Code with *Griffin v. California*, 380 U.S. 609 (1965) and *Brooks v. Tennessee*, 406 U.S. 605 (1972).

As long ago as *Holt v. United States,* 218 U.S. 245, 252 (1910), Mr. Justice Holmes observed that only "an extravagant extension of the 5th Amendment" would bar the use of all evidence originating with or provided by a suspect, pointing out that the extension of such a principle to the limits of its logic would justify a criminal defendant's refusal to attend his own trial because of the danger of incriminating identification. Accordingly, the prohibition against compelling an individual to incriminate himself has traditionally been regarded as "a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*

Quite obviously the involuntary delivery of forty-seven allegedly obscene magazines into court in response to a subpoena duces tecum cannot realistically be equated with the production of identifying physical characteristics involving "no compulsion of the accused to give evidence having testimonial significance." *United States v. Wade,* 388 U.S. 218, 222 (1967). Such a testimonial response is not "an essentially neutral act," *California v. Byers,* 402 U.S. 424, 432 (1971), but precisely the sort of communicative revelation that up to now has always been regarded as being within the scope of the Fifth Amendment privilege. *United States v. Saline Bank,* 1 Pet. 100, 104 (1828); *Boyd v. United States,* 116 U.S. 616 (1886); *Couch v. United States,* 409 U.S. 322, 323 (1973). Under such circumstances the witness was "no more bound to produce the book than to give testimony to the facts which it disclosed." *Ballmann v. Fagin,* 200 U.S. 186, 195 (1906).

Against these considerations the Respondent advances the argument that Michael McKelva's previous display

of the publications for sale to the public rendered his invocation of the Fifth Amendment privilege ineffective. There are at least two distinct assumptions implicit in this approach: first, that periodic references in the Court's previous decisions to "private papers" have limited the application of the privilege to *private* (in the sense of "confidential") documentary evidence; and, secondly, that a previous commercial display of the magazines constituted a "waiver" of the privilege. The position is altogether insupportable because neither of its premises can be sustained.

First of all, the Court's utilization of the phrase "private books and papers" in *Boyd v. United States,* 116 U.S. 616 (1886) clearly did not contemplate such a restricted interpretation of the privilege; a shipping invoice for twenty-nine cases of plate glass is hardly the sort of document whose existence or communicative content can reasonably be characterized as "confidential."[13] That interpretation of the term "private" was subsequently excluded by the decision in *Wilson v. United States,* 221 U.S. 361, 378 (1911), holding that "where one's *private* documents would tend to incriminate him, the pri-

13. Of course, documentary evidence that has at some previous point in time lost all indicia of confidentiality may nevertheless have reassumed "private" characteristics by the time a subpoena seeks its disclosure, thereby providing a realistic claim for both Fourth *and* Fifth Amendment protection, as in *Boyd* itself.

But this is simply to say that the communicative content of *all* subpoenaed documents is necessarily "confidential," to the extent that the party demanding their production is unable to secure the information they contain from any other source. Plainly the Respondent is not suggesting that the *communications* contained in the forty-seven magazines were not "private" *and* "confidential" in every meaningful sense on the date of the trial. The City could produce no witnesses to testify either to the communicative content of the publications or to their whereabouts at any time after January 4, 1973.

vilege exists although they were actually written by another person" (emphasis added). And in *United States v. White*, 322 U.S. 694, 699 (1944), the Court held that "the papers and effects which the privilege protects must be the *private* property of the person claiming the privilege, or at least in his possession in a purely *personal* capacity" (emphasis added).

Each of these decisions establishes that "private" documents need not contain "confidential" communications so long as they are held in a *personal* rather than a *representative* capacity. Thus, in a long line of decisions,[14] the Court has determined that the protection of the privilege extends only to *private* individuals, not to economic or political aggregations such as corporations, labor unions and the like. "A custodian [of corporate records], by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers." *Curcio v. United States*, 354 U.S. 118, 123-24 (1957).

In a similar sense the Court has refused to extend the privilege to those records required by law to be kept as part of a legislative regulatory program unrelated to the detection of crime. *Shapiro v. United States*, 335 U.S. 1, 17 (1948); *Davis v. United States*, 328 U.S. 582, 589-90 (1946); *Wilson v. United States*, 221 U.S. 361, 380 (1911); *cf. United States v. Sullivan*, 274 U.S. 259 (1927). Implicit in this approach is the recognition that such "required

14. *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. United States*, 221 U.S. 361 (1911); *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946); *United States v. White*, 322 U.S. 694, 699 (1944); *Rogers v. United States*, 340 U.S. 367, 372 (1951); *McPhaul v. United States*, 364 U.S. 372, 380 (1960).

records" have a "public aspect" that necesarily provides the government with a greater claim to possession of them than the individual maintaining them. "The distinction is between property to which the government is entitled to possession and the property to which it is not." *Davis v. United States,* 328 U.S. at 590.

Obviously, however, the City of Temple could not conceivably have asserted a possessory interest in the forty-seven magazines superior to Michael McKelva's; on the contrary, his right to possession of them was presumptively established by the First, Fourth and Fourteenth Amendments. He did not hold the publications in a representative capacity, nor were they records required to be kept by law. Consequently, none of the established exceptions to the privilege are relevant.

The Respondent's effort to limit the scope of the Fifth Amendment to documentary evidence characterized by some undefined degree of "privacy" finds not the slightest support in precedent; lower court decisions are all the other way. See, *e.g., United States v. Judson,* 322 F.2d 460, 462-63 (9 Cir., 1963) (cancelled checks and bank statements); *de Antonio v. Solomon,* 42 F.R.D. 320 (D. Mass., 1967) (passport). The Ninth Circuit has explicitly disclaimed the theory. *United States v. Cohen,* 388 F.2d 464, 471 (9 Cir., 1967). And by implication this Court has also rejected it in *Couch v. United States,* 409 U.S. 322 (1973), since the taxpayer's records involved there were no more and no less "confidential" than the magazines involved here.

Even apart from precedent, however, there remains the practical impossibility of drawing any principled constitutional distinction between "confidential" communica-

tions protected by the Fifth Amendment and "nonconfidential" communications that are not. A gunman cannot reasonably regard as "confidential" his *res gestae* statements during the course of a bank robbery, but the Fifth Amendment would plainly protect him against being forced to repeat those statements under oath as a witness at his own trial.

The source of the Respondent's confusion arises from the misconception that the privilege against self-incrimination serves only to protect a right of "privacy." Certainly that is *one* of its functions, and in this respect the Fourth and Fifth Amendments "run almost into each other." *Boyd v. United States,* 116 U.S. 616, 630 (1886); *Davis v. United States,* 328 U.S. 582, 587 (1946); *Mapp v. Ohio,* 367 U.S. 643, 657 (1961). However, the Fifth Amendment has traditionally been viewed as a constitutional safeguard protecting an individual against the use of "physical or moral compulsion to extort communications from him," *Holt v. United States,* 218 U.S. 245, 252 (1910), thus preserving a fundamental human value having little if anything to do with any questions of confidentiality. The right of privacy is not the ultimate origin of the admonition that, under our adversary system of justice, "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." *United States v. White,* 322 U.S. 694, 698 (1944); *Malloy v. Hogan,* 378 U.S. 1, 8 (1964); *Ullman v. United States,* 350 U.S. 422, 428 (1956).

Consequently, a "reasonable expectation of privacy" that may be of critical significance in a Fourth Amendment context, *Couch v. United States,* 409 U.S. 322, 328 (1973); *United States v. Dionisio,* 410 U.S. 1, 8-9

(1973); *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968); *Katz v. United States*, 389 U.S. 347, 351 (1967); *Lewis v. United States*, 385 U.S. 206, 211 (1966), is always subordinate and frequently irrelevant when the issue of primary concern is not the "private" character of the communications but the fact of an official effort to extort them under compulsion. *Couch v. United States*, 409 U.S. 322, 328 (1973). Our entire constitutional history rebels at the suggestion that the extortion may be justified so long as the information obtained can be characterized as a matter of public knowledge.

The "waiver" theory is equally flawed, proceeding from the essentially fictional premise that an individual who offers magazines for sale to the public intends by that act to forego any future claim of the Fifth Amendment privilege with regard to the communicative content of the magazines themselves. There is simply nothing whatever in the record to suggest that Michael McKelva had the slightest intention of relinquishing such a fundamental constitutional right when he opened his newsstand; that fact in itself is enough to defeat any claim of "waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Smith v. United States*, 337 U.S. 137, 150 (1949); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Boykin v. Alabama*, 395 U.S. 238 (1969).

Moreover, a virtually identical argument has already been considered and rejected by the Court in *Marchetti v. United States*, 390 U.S. 39 (1968), where the Government contended that, even if the disclosures required by the Federal wagering tax statutes were within the scope of the privilege, the individuals affected by them had "waived" their Fifth Amendment rights by failing to

register and voluntarily continuing to gamble. "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51-52.

Essentially the Respondent is arguing that Michael McKelva's exercise of his rights under the First Amendment required him to give up the guarantees of the Fifth. Again, the contention has already been effectively denied, the Court finding it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968); *United States v. Jackson*, 390 U.S. 570, 582-83 (1968); *cf. Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

Like the attempt to limit the privilege's application to "private" documentary evidence, the argument based on waiver has the practical disadvantage of being illimitable. If placing magazines before the public for sale constitutes a "waiver" of the privilege to resist a subpoena for them, the very *fact* of engaging in public criminal activity must logically accomplish the same result. The ultimate implication, of course, is that no one is ever entitled to assert the privilege under any circumstances.

Even more significantly, the "waiver" theory disregards the circumstance that compliance with the subpoena would by *itself* have constituted a testimonial or communicative act within the privilege's protection because of the witness's implicit guarantee that the maga-

zines produced were in fact those demanded. Apart from the publications' inherently communicative character, a previous public display of them could not "waive" the potentially self-incriminatory assertion inherent in the act of production itself. *Curcio v. United States,* 354 U.S. 118, 125 (1957); *United States v. Blank,* 459 F.2d 383, 385 (6 Cir., 1972); *United States v. Cohen,* 388 F.2d 464, 466 (9 Cir., 1967); *People v. Defore,* 242 N.Y. 13, 150 N.E. 585, 590 (1926). The principle has been characterized as "universally conceded." 8 *Wigmore, Evidence* § 2264 (McNaughton rev. 1961); McCormick, *Evidence* § 126 (2nd. ed. 1972).[15]

In light of the foregoing considerations it is not particularly surprising that virtually all lower courts have assumed as a matter of course that the Fifth Amendment privilege may properly be invoked to resist compulsory production of allegedly obscene material pursuant to a subpoena duces tecum. See, *e.g., State v. Eros Cinema, Inc.,* 262 La. 706, 264 So.2d 615, 619 (1972); *People v. DeRenzy,* 275 Cal. App.2d 380, 79 Cal. Rptr. 777, 780 (1969); *Smith v. Fair,* 363 F. Supp. 1021 (N.D. Ohio, W.D., 1973); *Maley v. Meyers,* reproduced in Appendix C of this brief at pages 74-82. By implication the Texas Legislature itself recognized the applicability of the privilege when it provided in (now repealed) section 9(c) of Article 527 of the Penal Code, relating to

15. Superficially, the Court's decisions in *United States v. Dionisio,* 410 U.S. 1 (1973) and *United States v. Mara,* 410 U.S. 19 (1973), both of which sustained subpoenas requiring the production of identifying physical characteristics, might suggest a contrary result, since compliance with the subpoena was likewise a testimonial act.

The significant fact, of course, is that the testimonial assertion implicit in such compliance is in no sense actually or potentially self-incriminatory; it is, rather, "essential neutral." *California v. Byers,* 402 U.S. 424, 432 (1971).

prior adversary hearings on the issue of obscenity, that an adverse party would be *permitted* to produce the allegedly obscene material at the hearing but that under no circumstances would he be *required* to produce it.

Apparently the Respondent places almost exclusive reliance on *Anderson v. Coulter,* 108 Ariz. 388, 499 P. 2d 103 (1972), *cert. denied,* 410 U.S. 990 (1973) in support of his theory that Michael McKelva was nevertheless obligated to produce the forty-seven magazines.[16] Aside from the fact that *Anderson* is predicated exclusively upon the discredited "waiver" approach, it is factually distinguishable from the present case. While in *Anderson* the State supposedly had knowledge of the communicative content of the subpoenaed film (thereby rendering somewhat less formidable the testimonial assertion inherent in the act of compliance), the City of Temple was unable to establish such an independent evidentiary predicate. None of its witnesses had ever seen the contents of the forty-seven magazines, and none was able to describe even the *cover* of any particular magazine. The subpoena itself identified the publications only by title. Consequently, compliance under these circumstances would necessarily have authenticated the magazines as being those sought

16. The decision reversed a ruling of the Arizona Court of Appeals that found the privilege applicable to a subpoena for allegedly obscene films. *Anderson v. Coulter,* 16 Ariz. App. 27, 490 P.2d 856, 860 (1971).

Significantly, the United States District Court for the District of Arizona has effectively nullified the holding of the Arizona Supreme Court by granting habeas corpus relief to an individual held in contempt for having exercised what the District Court concluded was his right under the Fifth Amendment to resist a subpoena for an allegedly obscene film on grounds of possible self-incrimination. See *Russell v. Blubaum,* D. Ariz., July 11, 1973, reproduced in Appendix D of this brief at pages 83-87.

by the City, a type of testimonial assertion that apparently could have been provided by no one else.

The real vice of the decision in *Anderson,* however, is its supposition that there is something "illogical and irrational," 499 P.2d at 106, in according an individual the simultaneous protection of both the First and Fifth Amendments. That conclusion is premised on the altogether erroneous misconception that an individual who asserts the Fifth Amendment privilege must necessarily be guilty of a criminal offense. Yet plainly a person "may have a reasonable fear of prosecution and yet be innocent of any wrongdoing." *Slochower v. Board of Higher Education,* 350 U.S. 551, 557-58 (1956); *Ullman v. United States,* 350 U.S. 422, 426 (1956). The history of obscenity litigation has enshrined as indisputable the proposition that a distributor of books and films may entertain a realistic apprehension of criminal prosecution sufficient to support a claim of the Fifth Amendment privilege without simultaneously conceding that the material he distributes is obscene. See, *e.g., Jenkins v. State,* 199 S.E.2d 183 (S.Ct. Ga., 1973), now pending on the docket of this Court as No. 73-557, *Jenkins v. Georgia.*

The entirety of the Respondent's position is an official rationalization, grounded ultimately on expediency and wholly unsupported by the history and internal logic of the Fifth Amendment. The Court has never before subjected the privilege against self-incrimination to such pragmatic considerations, and it should not do so now. "It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise." *Quinn v. United States,* 349 U.S. 155, 164 (1955).

2. An attorney who in good faith advises his client to resist compliance with a subpoena duces tecum on grounds of possible self-incrimination, and who is thereafter adjudged in contempt of court solely for "advising and counseling" the client's disobedience of the subpoena, is thereby deprived of rights guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments.

Certainly neither the Petitioner nor any other responsible member of the legal profession would contend that obedience to law is not one of the supreme virtues of life in a civilized society. The statement of the obligation as a general proposition is unexceptionable.

But a sincere and abiding respect for the rule of law by no means entails adherence to the mistaken conception that undeviating and unquestioning obedience to governmental authority is invariably a prerequisite for responsible citizenship. As an institution the Court has consistently recognized the legitimacy of nonviolent resistance to unconstitutional laws as an appropriate means of establishing their invalidity.[17] Implicit in this perspective is the recognition that in many instances the only effective technique for vindicating Federal rights entails a calculated disregard for the laws that abridge them.[18]

The Court's previous decisions thus establish uniformly that the unconstitutionality of a legislative enactment will

17. *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Barr v. Columbia*, 378 U.S. 146 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964); *Bouie v. Columbia*, 378 U.S. 347 (1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961).

18. Compare *Poe v. Ullman*, 367 U.S. 497 (1961) with *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

ordinarily constitute a complete defense to a criminal prosecution for violating it.

On the other hand, disobedience of even an unconstitutional or otherwise invalid judicial order, judgment or decree will frequently entail adverse consequences for efficient judicial administration that far outweigh any harm that might be occasioned by compliance with the order until such time as it has been subjected to the ordinary processes of appellate review. Essentially in light of this consideration, the Court has developed the principle that the invalidity of an injunctive decree, even on constitutional grounds, will normally not constitute a defense to a citation for contempt resulting from disobedience of it so long as the court had jurisdiction of the parties and subject matter of the controversy. *United States v. United Mine Workers,* 330 U.S. 258 (1947); *Howat v. Kansas,* 258 U.S. 181 (1922); *Gompers v. Buck's Stove and Range Co.,* 221 U.S. 418 (1911); *United States v. Shipp,* 203 U.S. 563 (1906); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 179 (1968). So long as effective avenues for judicial relief are established and available, there exists a continuing obligation to pursue those remedies in lieu of the alternative of self-help; it cannot be presumed in the absence of any legitimate appeal to the judiciary's corrective processes that the effort would have been unavailing. *Walker v. City of Birmingham,* 388 U.S. 307, 319 (1967).

Of necessity, however, the *Mine Workers* doctrine is premised on the implicit assumption that adherence to the traditional course of judicial review (perhaps greatly expedited, when necessary)[19] will effectively preserve and

19. See, *e.g., New York Times Company v. United States,* 403 U.S. 713 (1971).

protect fundamental constitutional rights that might otherwise be impaired or destroyed by obedience to the commands of an unconstitutional judicial decree. As a matter of simple and straightforward logic, the doctrine has no application to the situation in which compliance with the order of a Judge would risk an irreparable and irretrievable surrender of a fundamental constitutional right resulting from the unavaliability of a judicial remedy for testing the legality of the order prior to the time that compliance is demanded.

Thus, in *Johnson v. Virginia,* 373 U.S. 61 (1963), the Court summariiy reversed the contempt conviction that resulted when a black man disregarded a Richmond Traffic Court Judge's order to be seated in a section of the courtroom reserved for Negroes. The same result followed in *Hamilton v. Alabama,* 376 U.S. 650 (1964), *reversing* 275 Ala. 574, 156 So.2d 926 (1963), where the contempt resulted from the black Petitioner's refusal to testify as a witness during a criminal trial until the prosecutor accorded her the same courtesy he had shown to previous white witnesses by addressing her as "Miss Hamilton" rather than as "Mary." See also *Hickman v. Taylor,* 329 U.S. 495 (1947); *Gibson v. Florida Legislative Investigation Commission,* 372 U.S. 539 (1963); *NAACP v. Alabama,* 357 U.S. 449 (1958); *cf. United States v. Cox,* 342 F.2d 167 (5 Cir., 1965), *cert. denied sub nom. Cox v. Hauberg,* 381 U.S. 935.

Each of these cases stand clearly and irrefutably for the same proposition: that an individual may choose to disobey what he regards to be an invalid or unconstitutional judicial order *if* (i) compliance with the order would risk irreparable loss of a fundamental Federal right, and (ii) the circumstances are such that no avail-

able judicial remedy exists for testing the validity of the order prior to the time that compliance with it is demanded by the Judge. Because the rationale underlying the *Mine Workers* doctrine is inapplicable in these circumstances, the doctrine itself is inapplicable. *Cf. Walker v. City of Birmingham,* 388 U.S. 307, 315 and n. 6, 318 (1967).

The refusal to comply with a judicial order to provide potentially self-incriminatory testimonial or documentary evidence despite a valid invocation of the Fifth Amendment privilege against self-incrimination is, of course, a classic exception to the *Mine Workers* rule. Since a witness who has once involuntarily disclosed the privileged information cannot thereafter retrieve it,[20] and since there are no effective remedies available to the witness for attacking a Trial Judge's ruling in a higher court before compliance is required,[21] disobedience of a judicial decree threatening an involuntary surrender of the Fifth Amend-

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20. "[O]nce the witness has complied with an order to testify, he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling the testimony violated constitutional rights. In such a predicament, the damage is irreparable. No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed." *United States v. Dickinson,* 465 F.2d 496, 512 (5 Cir., 1972) (footnote omitted); see also *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951).

21. Apparently no Texas appellate court has ever before in the history of the State entertained an application for a writ of mandamus or prohibition to compel a Judge to recognize the assertion of the Fifth Amendment privilege against self-incrimination during the pendency of a trial. In an administrative sense such a procedure would be unworkable, and in any event the time span between Michael McKelva's initial refusal to produce the magazines and the imposition of the contempt judgment was only a few hours. Even if some remedy had been available in theory, it would have been futile to pursue it (see Appendix B of this brief).

ment privilege has always been regarded as an appropriate means of resolving the matter in another forum, and in this situation, quite obviously, the constitutional invalidity of the order will result in the reversal of a conviction for contempt. *Quinn v. United States,* 349 U.S. 155 (1955); (*Patricia*) *Blau v. United States,* 340 U.S. 159 (1950); (*Irving*) *Blau v. United States,* 340 U.S. 332 (1951).

Despite the foregoing considerations, the Respondent nevertheless continues to maintain the totally untenable position that a witness adjudged in contempt of court for having declined to obey a Trial Judge's order to waive a claim to the Fifth Amendment privilege cannot thereafter assert the constitutional invalidity of the order as a basis for setting aside the contempt judgment. Apparently the Respondent regards Judge Clawson's ruling on the issue as having concluded the matter.

The Respondent's persistent adherence to the theory presumably arises from Judge Clawson's misconception that a witness ordered by a court to produce potentially self-incriminatory testimonial or documentary evidence is obligated to comply with that order and *thereafter* to seek vindication of his Fifth Amendment rights by moving to exclude the illegally obtained evidence from any resulting criminal prosecution (A. 32). The argument seems to be premised on the assumption that, just as the courts must initially undertake the responsibility for determining the admissibility of evidence obtained by police and prosecutors in violation of the Fourth and Fifth Amendments, *Mapp v. Ohio,* 367 U.S. 643 (1961); *Miranda v. Arizona,* 384 U.S. 436 (1966), so they must also have the authority to determine the admissibility of *any* evidence for which the Fifth Amendment privilege is claimed, thereby necessitating the production of such

evidence in order that the Judge may satisfy himself that it is, in fact, actually or potentially self-incriminatory.

The implications of this argument are remarkable.

First, its acceptance would effectively destroy the invocation of the privilege. If after-the-fact suppression of incriminating evidence in a subsequent criminal prosecution were sufficient to preserve Fifth Amendment rights, no witness would ever be entitled to assert them.

Secondly, the argument renders academic an issue that has only recently divided the Court: whether statutes conferring immunity from criminal prosecution must provide transactional, rather than use or derivative use, immunity in order to satisfy minimum Fifth Amendment standards. From the Respondent's perspective, *no* grant of immunity is necessary; all that is constitutionally required is that the witness be provided with an opportunity to move for the exclusion of the illegally obtained evidence after he has been brought to trial on the basis of it. (Certainly the Respondent must find regrettable the Court's inability to perceive this truth before it went to the trouble of deciding *Kastigar v. United States*, 406 U.S. 441 (1972) and *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972)).

Finally, since Judge Clawson was supposedly entitled to look behind the assertion of the privilege in order to determine for himself whether the production of the forty-seven magazines would have violated Michael McKelva's Fifth Amendment rights, he must necessarily have been authorized to determine whether the witness's testimony was constitutionally protected by demanding that he testify. In conjunction with his earlier confusion regarding the implications of the *Mine Workers* doctrine,

the Respondent is thus contending that all individuals asserting the Fifth Amendment privilege must waive it on demand of a Judge, a refusal to do so being punishable by a judgment of criminal contempt against their lawyers, the validity of which is unassailable despite the unconstitutionality of the order from which it resulted.

Even apart from its draconian consequences, this approach has been nullified by more than a century and a half of constitutional litigation under the Fifth Amendment. Beginning with Chief Justice Marshall's decision in *United States v. Burr*, F. Cas. No. 14692e, p. 40 (C.C. Va., 1807), through *Boyd v. United States*, 116 U.S. 616 (1886); *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906), and *Arndstein v. McCarthy*, 254 U.S. 71, 73 (1920), culminating in *Hoffman v. United States*, 341 U.S. 479, 488 (1951), the Court has consistently recognized[22] that requiring a witness to demonstrate his entitlement to the privilege would result in precisely the sort of potentially self-incriminatory disclosure which it is the object of the Fifth Amendment to interdict.[23] The invocation of the privilege *must be sustained* unless it is *perfectly clear*, from a careful consideration of all the surrounding circumstances, that the testimonial disclosure *cannot possibly* have a tendency to incriminate the witness. "If, in such

22. With the apparent exception of the ill-considered *dictum* in *Consolidated Rendering Company v. Vermont*, 207 U.S. 541, 552-53 (1908), repeated in *Brown v. United States*, 276 U.S. 134, 144 (1928). Since neither of these cases recognized the witness's entitlement to the Fifth Amendment privilege, they cannot be regarded as contrary authority.

23. "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Hoffman v. United States*, 341 U.S. at 486.

a case, [the witness says] upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact." *United States v. Burr, supra.*

Not one of the Court's previous decisions has ever suggested the propriety or desirability of imposing a prophylactic exclusionary rule on evidence illegally obtained by *Judges* in order to preclude the exercise of the Fifth Amendment privilege. The utilization of that technique in the context of *Mapp v. Ohio,* 367 U.S. 643 (1961) and *Miranda v. Arizona,* 384 U.S. 436 (1966) is obviously the product of little more than the judiciary's practical inability to interdict violations of Fourth and Fifth Amendment rights *before they occur.*[24] The same considerations are hardly relevant when the potential victim and his attorney can invoke established judicial processes to prevent altogether any sort of compulsory testimonial disclosure.

The fundamental flaw in the Respondent's position is attributable to the misconception that the exclusion of evidence illegally obtained by a Judge over a witness's invocation of the Fifth Amendment privilege is the functional equivalent of a grant of use and derivative use immunity under the standards prescribed by *Kastigar* and *Zicarelli.* Clearly it is not. When a State confers before-the-fact immunity from criminal prosecution in exchange

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24. In a similar sense the Court has felt compelled "to accomodate the interests of the State and Federal Governments in investigating and prosecuting crime" by prohibiting Federal use or derivative use of evidence obtained by State officials following a grant of immunity from State criminal prosecution. *Murphy v. Waterfront Commission,* 378 U.S. 52, 79-80 (1964). It has declined to adopt a suggested exclusionary rule when such competing policy considerations have not been compelling. *Marchetti v. United States,* 390 U.S. 39, 58-60 (1968).

for involuntary testimonial disclosures, that juridical act *automatically* bars the utilization of such evidence against the witness in any subsequent State or Federal criminal prosecution. An exclusionary rule would not preclude the use of the evidence if the State courts were ultimately to conclude that the compulsory disclosure was not within the Fifth Amendment privilege, which was apparently the position of both the Trial Judge and the Supreme Court of Texas in the present case. Consequently, the Respondent's approach would leave the witness vulnerable to a criminal prosecution and conviction based upon illegally obtained evidence, perpetuated by the refusal of the State courts to concede that the evidence was, in fact, illegally obtained. The mere existence of an ultimate Federal remedy for that judicial error simply cannot realistically be equated with a grant of immunity.

Nor can it be seriously argued that this Court should formulate a rule that would meet the foregoing objections by requiring a witness to comply with a State Court's demand for potentially self-incriminatory testimonial disclosures so long as no use or derivative use were made of the evidence obtained *regardless* of the witness's entitlement to the protection of the Fifth Amendment privilege. Such an approach would amount to nothing less than judicial enactment of the immunity statute that the Texas Legislature has thus far declined to adopt and an unprecedented assumption of a legislative prerogative that, under established principles of Federalism and comity, has traditionally been consigned to the States.

In view of the foregoing considerations, Michael McKelva was plainly entitled to avoid the risk of an irrevocable and irretrievable surrender of his Fifth Amendment rights by refusing to produce the forty-seven magazines. The

critical issue is whether his attorney was entitled in good faith to advise and counsel that course of action.

Apparently no reported precedent in our constitutional history even remotely suggests that he was not. There have, of course, been numerous judicial decisions holding or implying that an attorney may properly be adjudged in contempt for counseling disobedience of other sorts of court orders or decrees not entailing such spectacular hazards for the constitutional rights of those affected by them.[25] In those circumstances the implicit premise of our judicial system has been that the proper procedure for correcting such defective orders, even if their invalidity is of constitutional proportions, is by appeal to the judicial process itself, not by resort to a species of self-help that places the attorney and his client above the law. *Fisher v. Pace*, 336 U.S. 155, 162 (1949); *cf. New York Times Company v. United States*, 403 U.S. 713 (1971). When a lawyer precipitously by-passes available judicial remedies and casually usurps the functions of a Judge, there is little reason in principle for exempting him from the same consequences that are likely to befall his client. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).[26]

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25. *In re Bongfeldt*, 22 Cal. App. 3d 465, 99 Cal. Rptr. 428, 435 (1972) (dictum); *Petition of Green*, 172 Ohio St. 269, 175 N.E.2d 59, 62-63 (1961), *revd. on other grounds*, 369 U.S. 689 (1962); *Holt v. McLaughlin*, 357 Mo. 844, 210 S.W.2d 1006 (1948); *Schmidt v. United States*, 115 F.2d 394, 396 (6 Cir., 1940) (dictum); *Leber v. United States*, 170 F. 881, 889-90 (9 Cir., 1909); *In re Noyes*, 121 F. 209 (9 Cir., 1902); *Anderson v. Comptois*, 109 F. 971, 974 (9 Cir., 1901); *People ex rel. Alexander v. District Court of Tenth Judicial District*, 29 Colo. 182, 68 P. 242, 263 (1901).

26. Even this concession may not be altogether warranted. Under long-established Texas law a person may not be adjudged in contempt for having refused to obey an order that the Court had no power or authority to enter, *Ex parte Davis*, 171 Tex. Cr. R. 629, 353 S.W.2d 29 (1962); *Ex parte Lillard*, 159 Tex. 18, 314 S.W.2d

Obviously the matter is altogether different when an attorney and his client are confronted with a Judge's demand that they desist immediately from asserting what they believe in good faith to be the client's Federal constitutional rights under the Fifth Amendment. Effective judicial review of the order is impossible if involuntary compliance is forthcoming. If the client's privilege against self-incrimination is to be preserved intact, disobedience is not merely one alternative; it is the *only* alternative. The witness's dilemma is compounded by the fact that, because of no more than the Trial Judge's hostility or insensitivity to his invocation of the privilege, he may ultimately go to jail for having exercised one of his most fundamental constitutional rights. It is little comfort that coercive confinement of a recalcitrant witness for *civil* contempt, with a provision that he may subsequently purge himself by providing the information if his claim of the privilege is ultimately rejected by higher courts, is a practical necessity because of the unavailability of any workable alternative for compelling compliance that has been lawfully demanded.[27]

800, 806 (1958), a rule contrary to that recognized by Alabama in *Walker v. City of Birmingham*, 388 U.S. at 319-20.

If the courts of a State are prepared to recognize the constitutional invalidity of a judicial decree as a viable defense in contempt proceedings resulting from disobedience of it, all relevant considerations may very well justify according an attorney absolute immunity for advice given in good faith. See, in this regard, *Thomas v. Collins*, 323 U.S. 516, 522 (1945), a decision not discussed or even cited in *Walker v. City of Birmingham*.

27. The resulting hardship for Texas witnesses has been ameliorated to some extent by the Fifth Circuit's decision in *Dawkins v. Crevasse*, 391 F.2d 921 (5 Cir., 1968).

Unfortunately, the inability of the Supreme Court of Texas to perceive the inequity resulted in Michael McKelva serving seven days in the Bell County Jail until, in the face of impending relief from a United States District Court, he was ultimately released "for good behavior."

On the other hand, threatening a witness *and his attorney* with *criminal* contempt sanctions (that in Texas may range up to six months in jail and a $1,000.00 fine under Article 1911a) plainly has an appreciable tendency to coerce an involuntary waiver of the privilege by a witness who, while honestly believing that his invocation of the Fifth Amendment is justified, is nevertheless reluctant to risk such severe penalties because of fear that he may ultimately turn out to have been mistaken. Such a threat renders continued reliance on the privilege "costly" in precisely the sense condemned by the decisions of this Court. *Spevack v. Klein,* 385 U.S. 511, 515 (1967); *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967); *Gardner v. Broderick,* 392 U.S. 273, 278-79 (1968); *Slochower v. Board of Education,* 350 U.S. 551, 557-58 (1966).

Conceivably both an attorney and his client *might* be subject to punishment for criminal contempt if the circumstances under which the privilege were asserted were sufficient to establish beyond a reasonable doubt that the Fifth Amendment was being utilized merely as a transparent shield for the obstruction of justice. Thus, if a witness at the instigation of his lawyer continues to rely on the privilege following a valid grant of use and derivative use immunity satisfying the standards of *Kastigar v. United States,* 406 U.S. 441 (1972), and if they refuse to offer any plausible justification for such continued recalcitrance,[28] then presumably a Trial Judge *might* be justified in concluding that such willful resistance

28. For example, a realistic and substantial risk of self-incrimination and subsequent criminal prosecution under the laws of a foreign jurisdiction. See *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 478 (1972).

to judicial authority could properly be punished as a criminal contempt. Of course, in such circumstances an attorney would not be acting to preserve his client's constitutional rights but simply to thwart legitimate official inquiry.

But plainly this is not such a case. On the record the Petitioner's good faith is unassailable, and there is not the slightest evidence of the contumacious intent that has traditionally been regarded as essential to the imposition of a valid judgment of criminal contempt.[29] "Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt as to most other crimes. *Good faith* pursuit of a plausible though mistaken alternative is antithetical to contumacious intent, however unimportant it may be in the context of civil contempt." *In re Brown,* 454 F.2d 999, 1007 (D.C. Cir., 1971) (footnote omitted; emphasis added); *United States v. United Mine Workers,* 330 U.S. 258, 303 (1947); *Nilva v. United States,* 352 U.S. 385, 395 (1957); *Wilson v. North Carolina,* 169 U.S. 586, 600 (1898); *Sykes v. United States,* 444 F.2d 928, 930 (D.C. Cir., 1971).

Of course, the fact that an attorney's conduct is "clearly blameworthy," *Offutt v. United States,* 232 F.2d 69, 72 (D.C. Cir., 1956), may in and of itself provide sufficient evidence of contumacious intent. On the other

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29. For that matter, in light of Judge Clawson's conclusion that the witness's failure to produce the forty-seven magazines was equivalent to an admission of their obscenity (A. 23), it is hardly plausible to assume that he could have regarded the Petitioner's advice to his client as a realistic threat to the administration of justice. *Holt v. Virginia,* 381 U.S. 131, 135, n. 2 (1965); *cf. Brown v. United States,* 356 U.S. 148, 153 (1958) ("Trial courts * * * must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice").

hand, if a lawyer is justified in the reasonable, good-faith belief that his advice to his client is neither wrongful nor blameworthy but rather is essential to prevent risk of an involuntary, ill-considered waiver of a fundamental constitutional right, that advice alone does not meet the minimum requirement of "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States v. Seale,* 461 F.2d 345, 367 (7 Cir., 1972).

Recognition of the foregoing principle is reflected by the Code of Professional Responsibility of the American Bar Association, adopted in section 8 of the Rules of the State Bar of Texas. Thus, Disciplinary Rule 7-102(A)(7) provides that in his representation of a client an attorney shall not "counsel or assist his client in conduct that the lawyer *knows* to be illegal or fraudulent" (emphasis added). By necessary implication an attorney may properly counsel a course of action that he believes in good faith to be necessary for the preservation of his client's constitutional rights.

Likewise, under the following subprovision of the same rule, a lawyer may not "*knowingly* engage in other illegal conduct, or conduct contrary to a Disciplinary Rule" (emphasis added). And, along somewhat the same line, Ethical Consideration 7-27 points out that "a lawyer should not suppress evidence that he or his client has a legal obligation to produce." Obviously, if any attorney reasonably believes that his client is *not* obligated to forego reliance on the Fifth Amendment privilege simply because a Judge demands that he do so, neither of these provisions prohibits an attorney from advising and counseling continued resistance.

Finally, Ethical Consideration 7-22 provides: "Respect for judicial rulings is essential to the proper administration of justice [a proposition which the Petitioner and this Court have consistently recognized]; *however,* a litigant or his lawyer may, *in good faith and within the framework of the law,* take steps to test the correctness of a ruling of the tribunal" (emphasis added). Since "taking steps to test" a court's ruling (by way of appeal, habeas corpus, mandamus and so on) is ordinarily so manifestly permissible as not to require explicit approval, this provision sanctions precisely what was done in the present case: combined, good-faith resistance to a judicial order by a witness and his attorney, designed solely to avert the risk of an irrevocable surrender of Fifth Amendment rights under circumstances which necessarily precluded before-the-fact judicial review. "Within the framework of the law" Michael McKelva chose the only feasible course for testing the validity of Judge Clawson's order—he refused to comply with it.

All of this traditional wisdom and the consequences it implies were succinctly spelled out by the Court's opinion in *In re Watts,* 190 U.S. 1, 29 (1903), where

> "the essence of the alleged contempt was that, assuming [the client's] action was taken pursuant to the advise of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts *in good faith* and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule" (emphasis added).

See also *United States ex rel. Lynch v. Werksman,* 319 F. Supp. 353, 355 (N.D. Ill., E.D., 1970). Particularly in view of the fact that the legitimacy of the Petitioner's advice was subsequently confirmed by three United States District Courts, *Smith v. Fair,* 363 F. Supp. 1021 (N.D. Ohio, W.D., 1973); *Maley v. Meyers* (W.D. Tex., December 11, 1973) [Appendix C of this brief]; *Russell v. Blubaum* (D. Ariz., July 11, 1973) [Appendix D of this brief]; it can hardly be suggested that he was acting in bad faith.

* * *

The dual allegiance owed by an attorney to the courts he serves and to the clients whose interests he represents creates a paradox of unsettling proportions within the context provided by the Fifth Amendment. As an officer of the court, he is professionally obligated to respect the rule of law and its implementation through the exercise of judicial authority. But he is equally committed to preserving inviolate the privilege against self-incrimination and to advising his client in a manner that will accomplish that result.

In the circumstances of the present case, our constitutional history rejects the suggestion that the place of a conscientious advocate was on the side of the Judge. Contemporary concern for Fifth Amendment values has focused for the most part on the conduct of the police. *Miranda v. Arizona,* 384 U.S. 436 (1966). But it cannot be forgotten that the common law antecedents of the privilege against self-incrimination evolved not from the abuses of sheriffs and constables but from the excesses of over-zealous ecclesiastical and administrative tribunals —principally the High Commission and Court of Star

Chamber—whose *Judges* habitually adopted the simple expedient of compelling the witnesses before them to provide evidence of their own guilt.[30] As a consequence, the recognition of the privilege arose primarily from a desire to curb and restrain a particular sort of illegitimate judicial inquiry—precisely the sort that was attempted here.

Because the Fifth Amendment reflects "many of our fundamental values and most noble aspirations," *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964), and particularly because the privilege against self-incrimination "insists upon the equality of the individual and the state," *In Re Gault,* 387 U.S. 1, 47 (1967), the Court has recognized that the right to effective assistance of counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Powell v. Alabama,* 287 U.S. 45 (1932), dictates that attorneys be accorded the primary responsibility for preserving the privilege, even before the inception of formal criminal proceedings. *Kirby v. Illinois,* 406 U.S. 682, 688 (1972); *Miranda v. Arizona,* 384 U.S. 436, 460-61 (1966). Taken together the Fifth and Sixth Amendments reinforce each other; the resistance to official compulsion they contemplate can hardly be characterized as illegitimate simply because the coercion is judicial in origin.

Of course, no specific provision of the Constitution establishes the right of an attorney to counsel resistance to judicial decrees that threaten his client's Fifth Amendment privilege, just as there is no explicit guarantee of a lawyer's right to file a motion to disqualify a Judge, *Holt v. Virginia,* 381 U.S. 131 (1965) or of his right to make vigorous and even heated objections. *In re*

30. *DeLuna v. United States,* 308 F.2d 140, 144-50 (5 Cir., 1962); II Schwartz, *A Commentary On the Constitution of the United States* 818 (1968).

McConnell, 370 U.S. 230, 236 (1962). The right arises from the entire spectrum of constitutional values implicit in the Fifth and Sixth Amendments; from the Ninth Amendment's reservation "to the people" of unenumerated substantive rights, the existence and recognition of which are necessary concomitants of other rights specifically enumerated, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and from the guarantee of "liberty" preserved by the due process clause of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 572-73 (1972). The right exists, not for the personal gain or benefit of the legal profession, but because "its existence is necessary in making * * * express guarantees fully meaningful." *Griswold v. Connecticut*, 381 U.S. at 483.

If Michael McKelva had complied with Judge Clawson's order to produce the forty-seven magazines, he would have been conceding to that Judge the final authority for determining his entitlement to the protection of the Fifth Amendment privilege against self-incrimination. Yet responsibility for the *final* resolution of any constitutional question has always rested with this Court, *Marbury v. Madison*, 1 Cranch 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958), just as the decision to assert or to waive Fifth Amendment rights has traditionally been the prerogative of the individual, assisted by his attorney. Questions as momentous as these could not have been resolved in any other manner.

Because the totality of our collective experience under the Fifth and Sixth Amendments vindicates the action taken by the Petitioner, the judgment of criminal contempt against him cannot stand.

CONCLUSION

For the foregoing reasons the Petitioner respectfully suggests that the judgment of criminal contempt should be reversed and the Petitioner ordered discharged.

Respectfully submitted,

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June 1974

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APPENDIX A

The Constitution of the United States:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Amendment IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment XIV

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * "

Article 527, Texas Penal Code (1974 Supplement):

Text of article effective until January 1, 1974

Definitions

Section 1. As used in this Article:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(D) "Person" means any individual; partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration.

(F) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

* * *

General sale or distribution, etc., of obscene matter: penalty

Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

* * *

Sec. 8. (A) Every person who violates Section 3 is punishable by a fine of not more than $1,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $10,000, or by confinement in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such

basic maximum and additional days not to exceed 360 days in the county jail, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of Section 3 is punishable as a felony and by a fine of not more than $2,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $25,000, or by imprisonment in the penitentiary for not exceeding five years or both fine and imprisonment.

* * *

Search warrant for seizure of obscene material

Sec. 9. (a) An affidavit for a search warrant shall be filed with the magistrate describing the matter sought to be seized in detail. Where practical, the matter alleged to be obscene shall be attached to the affidavit for search warrant so as to afford the magistrate the opportunity to examine such material.

(b) Upon the filing of an affidavit for a search warrant, the magistrate shall determine, by examination of the matter sought to be seized, if attached, by an examination of the affidavit describing the matter, or by such other manner or means that he deems necessary, if probable cause exists for a hearing upon the question of the issuance of a search warrant. If the magistrate determines that probable cause exists for a hearing, he shall issue notice to the person or persons in possession of the matter, setting a time and place for a hearing to determine if a search warrant shall issue.

(c) The hearing on the affidavit for the issuance of a search warrant shall be at such time and upon such

reasonable notice given in such manner as the magistrate may direct. The magistrate's order as to notice and hearing shall give the adverse party the right to appear and produce the matter described in the affidavit for a search warrant, but shall not in any manner require him to produce the said matter.

* * *

Enforcement by injunction, etc.

Sec. 13. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

* * *

City of Tempie, Texas Municipal Obscenity Ordinance:

AN ORDINANCE PROHIBITING INDECENCY AND OBSCENITY IN A PUBLIC PLACE; PROHIBITING INDECENT EXPOSURE, PUBLIC NUDITY, DISPLAYING NUDE PICTURES IN PUBLIC; MAKING IT UNLAWFUL FOR A PERSON TO DISGUISE HIS TRUE SEX; AND PROHIBITING A PERSON FROM URINATING OR DEFECATING IN A PUBLIC PLACE; AND MAKING IT UNLAWFUL FOR A PERSON TO KNOWINGLY ENTER THE RESTROOM FOR THE OPPOSITE SEX; PROVIDING DEFINITIONS; PROVIDING PENALTIES; PROVIDING A SEVERABILITY CLAUSE; AND DECLARING AN EMERGENCY.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF TEMPLE, TEXAS, THAT:

* * *

SECTION 8: Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into the City of Temple for sale or distribution, or in the City of Temple prepares for sale or distribution, publishes, prints, exhibits, distributes, sells, or offers to distribute or sell, or has in his possession with intent to distribute or sell or to exhibit or offer to distribute or sell, any obscene matter is guilty of a misdemeanor.

SECTION 9: DEFINITIONS:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a

prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(C) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(D) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(E) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

SECTION 10: Any person who violates any provision of Sections 1-9, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine

not to exceed Two Hundred Dollars ($200.00). Each separate violation shall be treated as a separate offense.

* * *

SECTION 12: There exists a public emergency requiring that this ordinance be passed finally on the date of its introduction, and the Mayor having in writing declared the existence of such emergency and requested such passage, this ordinance shall be passed finally on the date of its introduction, this 19th day of October, 1972, and shall take effect immediately upon its passage and approval by the Mayor.

PASSED AND APPROVED this 19th day of October, 1972.

THE CITY OF TEMPLE, TEXAS

By: /s/ JAMIE H. CLEMENTS
Jamie H. Clements, Mayor

APPROVED AS TO FORM:

/s/ WILLIAM T. WILSON
William T. Wilson, City Attorney

ATTEST:

/s/ C. L. KEATON
C. L. Keaton, City Secretary

APPENDIX B

SUPREME COURT OF TEXAS

February 2, 1973

No. B-3821
Ex Parte) Habeas Corpus
Michael McKelva)

Relator's petition for writ of habeas corpus, filed herein this day, having been duly considered, it is ordered that said petition be, and hereby is, denied pending further information to complete the record.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of Ex Parte Michael McKelva, Habeas Corpus, as such order appears in the minutes of said Court under the date of February 2, 1973.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 2nd day of February, 1973.

GARSON R. JACKSON, Clerk

By Eugene Cervenka, Deputy

* * *

SUPREME COURT OF TEXAS

ORDER OF THE COURT

B-3823
Ex parte Michael McKelva

Petition for writ of habeas corpus is this day denied.

By the Court
In Chambers
February 5, 1973

I, Garson R. Jackson, Clerk of the Supreme Court of Texas do hereby certify that the above is a true and correct copy of order of the Supreme Court of Texas with reference to the case of EX PARTE MICHAEL McKELVA, No. B-3823, original habeas corpus.

In testimony whereof, witness my hand and the seal of the Supreme Court of Texas at the City of Austin on this 5th day of February, 1973.

Garson R. Jackson, Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. W-73-CA-6

MICHAEL McKELVA, Petitioner

v.

LESTER GUNN, as Sheriff of Bell County, Texas, Respondent

ORDER TO SHOW CAUSE

A verified application for the writ of habeas corpus having been filed with the Court pursuant to 28 U.S.C. § 2241 *et seq.* on behalf of Michael McKelva, hereinafter called Petitioner, and it appearing to the Court from the matters contained in the application that an order should be issued directing the Respondent Lester Gunn, as Sheriff of Bell County, Texas, to appear by counsel and to show cause why the writ of habeas corpus should not be granted and the Petitioner ordered discharged from custody,

IT IS ACCORDINGLY ORDERED that Respondent appear by counsel before this Court at the United States Courthouse in Austin, Texas, on the 9th day of February, 1973, at 1:30 p.m., or as soon thereafter as counsel can be heard, then and there to show cause, if any there be, why the writ of habeas corpus should not be granted and the Petitioner ordered discharged from custody.

IT IS FURTHER ORDERED that counsel for the Respondent, at or before the time of hearing, file with the

Clerk of the Court a response to the application filed herein and serve a copy of such response upon counsel for Petitioner.

IT IS FURTHER ORDERED that service of a copy of this order, together with copies of the application for the writ of habeas corpus and memorandum brief in support thereof, be made forthwith in any manner authorized by the Federal Rules of Civil Procedure upon the Respondent and upon the Attorney General of Texas in accordance with 28 U.S.C. § 2252.

Done at Austin, Texas, on this 8th day of February, 1973.

JACK ROBERTS
Jack Roberts
United States District Judge

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-73-CA-6

MICHAEL McKELVA, Petitioner

v.

LESTER GUNN, as Sheriff of Bell County, Texas, Respondent

ORDER

On this 9th day of February, 1973, came on to be heard Respondent's Motion to Dismiss, and it appearing to the Court that there is now no case or controversy and that all issues in this cause are moot, and that accordingly such Motion should be granted, it is hereby

ORDERED AND DECREED that Respondent's Motion to Dismiss is granted.

Entered this 9th day of February, 1973,

JACK ROBERTS
Jack Roberts
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-73-CA-87

KARL A. MALEY

v.

THE HONORABLE JAMES R. MEYERS

MEMORANDUM OPINION AND ORDER

Came on this day for consideration by the Court the petition of Karl A. Maley for writ of habeas corpus. Petitioner is an attorney who has been held in contempt of court for an incident arising from his representation of Mike McKelva, operator of Mike's News Stand, a distributor of predominantly pornographic materials in Temple, Texas. All State remedies presently available to Petitioner have been exhausted, in that the Texas Supreme Court and Court of Criminal Appeals have declined to grant relief. Petitioner has clearly manifested his intention not to pay the $500 fine assessed against him, and to go to jail if necessary. The "restraint" requirement of 28 U.S.C. § 2254 is satisfied in that Petitioner is on bond and will, according to Judge Meyers' order, go to jail upon refusal to pay the fine. *Marden v. Purdy,* 409 F.2d 784 (5th Cir. 1969). Judge Meyers has allowed Petitioner to remain free on personal recognizance bond pending the outcome of this collateral attack.

In early 1973, the City of Temple filed a civil proceeding to enjoin McKelva from distributing some 52 allegedly obscene magazines. The City issued a subpoena duces tecum directing McKelva to produce the 52 magazines for trial. While the injunction proceeding was, of course, civil in nature, McKelva would be subject to criminal prosecution under Article 527 of the Texas Penal Code upon a showing that the magazines he had exhibited and distributed were "obscene" within the meaning of that article. The question of the magazines' "obscenity" was likewise the critical issue in the injunction proceeding. At the injunction hearing, McKelva announced that he did not have five of the magazines, and filed a motion to quash the subpoena as to the remaining 47 publications. The motion was overruled by the trial judge, The Honorable J. F. Clawson of the 169th Judicial District Court of Bell County, who directed McKelva to produce the magazines within three hours.

When court reconvened three hours later, McKelva announced that he would not produce the magazines upon the advice of counsel that his right against self incrimination would be endangered by production of the evidence. Thereupon, Judge Clawson found McKelva in contempt for refusing to obey the subpoena and found his lawyers including Petitioner, guilty of contempt for advising and counseling McKelva not to obey the subpoena. Petitioner invoked his right, as an officer of the court, under TEX. REV. CIV. STAT. ANN. art. 1911a(2)(c), to be tried by a judge of a district court other than the offended court. Respondent was duly appointed for that purpose by the presiding judge of the Third Administrative Judicial District. Petitioner was subsequently tried before

Judge Meyers and found guilty of contempt. A $500 fine was assessed as punishment.

We begin our analysis by noting that the finding of contempt was in no way based upon any allegation of disrespectful or disruptive conduct by Petitioner, nor upon any failure to obey a court order directed to him. Rather, the contempt consisted of advising and counseling a client that his constitutional rights would be endangered by obeying a court order. Since the finding of Petitioner's contempt rests upon the proposition that he advised and counseled his client to perform an act of contempt, we must necessarily examine the propriety of the underlying assumption that McKelva's refusal to produce the magazines was contemptuous.

Even incorrect court orders must ordinarily be obeyed until set aside. The Fifth Circuit has held that an unconstitutional court order must be obeyed if: 1) the court has subject matter and personal jurisdiction; 2) adequate and effective remedies are available for orderly review of the challenged ruling; and 3) the order does not require an irretrievable surrender of constitutional guarantees. *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1972).

In this case, however, the order for McKelva to obey the subpoena duces tecum required the irretrievable surrender of a constitutional right, with no adequate and effective remedies being available for the orderly review of the challenged ruling. McKelva and his attorney had "no real opportunity to contest the unconstitutional order," *Id.* at 511. The choice had to be made on the spot, in the courtroom, whether to obey or disobey Judge Clawson's order. No immediate opportunity was avail-

able for appellate review of the order. Rather, McKelva's choice was either to refuse to obey the order or to be compelled to be a witness against himself, in violation of the Fifth Amendment.

> (I)t is obvious that if the order requires an *irrevocable* and permanent surrender of a constitutional right, it cannot be enforced by the contempt power. For example, a witness cannot be punished for contempt of court for refusing a court order to testify if the underlying order violates Fifth, Fourth or perhaps First Amendment rights. . . . (O)nce the witness has complied with an order to testify he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently developed that compelling the testimony violated constitutional rights.

Id. at 512.

Thus, the right against self incrimination is a right so vital and basic to our system of justice that the contempt power may not be invoked against one who disobeys a court order which would violate his Fifth Amendment rights. If Judge Clawson's order violated McKelva's Fifth Amendment rights, as we conclude it did, Petitioner was fully justified in advising his client of that fact. Indeed, for Petitioner to do otherwise would be contrary to the vigorous representation contemplated by the Sixth Amendment's guarantee of the right of an accused "to have the Assistance of Counsel for his defence."

In concluding that the underlying order for McKelva to obey the subpoena duces tecum contravened the Fifth Amendment, we find that the right against self incrimination extends to this situation involving a civil injunction proceeding, and that McKelva did not waive his Fifth

Amendment rights by offering the magazines for public sale. A subpoena duces tecum cannot be used to circumvent the Fifth Amendment protection against self incrimination. This is so although the proceeding is civil in form. In the leading case of *Boyd v. United States,* 116 U.S. 616 (1886), the Supreme Court held that the right against self incrimination extends to forfeiture proceedings which, " . . . though they may be civil in form, are in their nature criminal." *Id.* at 634. The Supreme Court has recently reaffirmed that the right against self incrimination

> . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.

Kastigar v. United States, 406 U.S. 441, 444-45 (1972). *See also, United States v. United States Coin & Currency,* 401 U.S. 715 (1971); *In re Gault,* 387 U.S. 1 (1967); *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964). In the present case, McKelva was fully justified in a reasonable belief that evidence obtained could be used against him in a criminal prosecution. Indeed, McKelva had previously been prosecuted in municipal court for violation of the Temple obscenity ordinance. (See this Court's Memorandum Opinion and Order in *McKelva v. The City of Temple,* Civil Action No. W-73-CA-10 (March 28, 1973).) No offer of immunity was made to McKelva. The civil injunction proceeding against McKelva was authorized by the same Article 527 of the Texas Penal Code which declares the exhibition and dis-

tribution of obscene matter to be a criminal offense. Civil and criminal liability arise from the same act. It follows that the right against self incrimination applies whether the proceeding be civil or criminal in form.

Respondent contends that McKelva waived his Fifth Amendment rights by offering the magazines for public sale. While the Fourth Amendment basically protects the right of persons to rely upon a reasonable expectation of privacy, *Katz v. United States,* 389 U.S. 347 (1967), the Fifth Amendment protects not privacy, but the accused's "freedom to decide whether to assist the state in securing his conviction." *In re Gault* 387 U.S. 1, 47 (1967). The fact that the magazines were offered for sale is no more relevant in the context of this case than would be the fact that narcotics had been offered for sale, were a subpoena duces tecum issued for such contraband, or that a defendant had publicly made a res gestae admission, were he compelled to take the stand and repeat his statement. The Fifth Amendment leaves no room for such prosecutorial short-cuts. The fact that a suspect voluntarily makes incriminating evidence publicly available does not mean that he may be involuntarily compelled to convict himself by producing that evidence in court, but rather means simply that he cannot object when such evidence is properly gathered by law enforcement authorities for use against him.

While we thus reject the reasoning of *Anderson v. Coulter,* 499 P.2d 103 (Ariz. 1972), upon which Respondent heavily relies, we further note that this case is factually distinguishable from *Anderson.* The evidence in *Anderson* had previously been fully examined and described by police officers, and the court could state confidently:

> It is obvious that the prosecution had everything it needed to identify the film and compliance with the subpoena duces tecum did no more than produce the film already known by both the prosecution and the court to exist.

Id. at 106. In the present case, the magazines sought were listed in the subpoena because they were on a list of suspected obscene magazines. The list was compiled by a Temple police officer during the course of his investigation of Mike's News Stand. Magazines were placed on the list upon the basis of the officer's observation of their partially concealed covers. The officer did not examine the contents of the magazines, and could not describe with particularity the cover of any of them. Thus, clearly the subpoena duces tecum in this case was designed to accomplish more than a " 'trivial degree of incrimination.' " *Id.* Rather, the magazines sought were the critical evidence in any effort to make a case against McKelva. Nor can it be said that producing the magazines would be a non-communicative act such as submission to a blood test, *Schmerber v. California,* 384 U.S. 757 (1966), giving a handwriting exemplar, *Gilbert v. California,* 388 U.S. 263 (1967), speaking and appearing in a police lineup, *United States v. Wade,* 388 U.S. 218 (1967), or stopping to give one's name and address after an automobile accident, *California v. Byers,* 402 U.S. 424 (1971). The magazines here were not sought for an "essentially neutral" purpose of identification, and were not "real or physical evidence" taken from the suspect's body. Rather, the subpoena sought to have McKelva gather as evidence the magazines, which were sought for their "communicative" or "testimonial" value.

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

Schmerber, supra at 763-64.

Thus, we conclude that the underlying order for McKelva to obey the subpoena duces tecum called for the irretrievable surrender of constitutional guarantees, and that Petitioner was only acting to protect the rights secured his client by the Fifth and Sixth Amendments to the Constitution. For this he cannot be held in contempt. It is accordingly

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus of Karl A. Maley be, and hereby is, GRANTED. Petitioner shall be relieved of any restraint imposed by the challenged judgment. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered the 20th day of December, 1973, at Austin, Texas.

/s/ JACK ROBERTS
Jack Roberts
United States District Judge

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-73-CA-87

KARL A. MALEY

v.

THE HONORABLE JAMES R. MEYERS

JUDGMENT

This action came on for consideration by the Court, Honorable Jack Roberts, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and ADJUDGED

that Respondent or his successor in office relieve petitioner, Karl A. Maley, of any restraint imposed in contravention of the Court's Memorandum Opinion and Order of December 20, 1973.

Dated at Waco, Texas, this 7th day of January, 1974.

DAN W. BENEDICT
United States District Clerk

By /s/ RUTH DREWERY
Deputy United States
District Clerk

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ-73-319 Phx WEC

GARY RUSSELL, Petitioner,

vs.

PAUL BLUBAUM, Sheriff of Maricopa County, Arizona, Respondent.

No. Civ-73-320 Phx WEC

HARRY KENNEDY and BRUCE STREEPER, Petitioners,

vs.

PAUL BLUBAUM, Sheriff of Maricopa County, Arizona, Respondent.

No. Civ-73-321 Phx WEC
(Consolidated)

MIKE ARNOLD, Petitioner,

vs.

PAUL BLUBAUM, Sheriff of Maricopa County, Arizona, Respondent.

ORDER

In these cases, which were consolidated for hearing, the City of Phoenix filed a civil action against petitioners in Maricopa County Superior Court, claiming they were exhibiting allegedly obscene films at two theatres in Phoenix. Petitioners were served with subpoenas duces tecum requiring them to produce the films in court. The complaint prayed "that the said film is determined, by this

Court, to be obscene, that Respondents be ordered to surrender it to Petitioner for possible criminal prosecution . . ." Petitioners stipulated to an injunction against any future exhibition of the films, and refused to surrender the films, moving to quash the subpoenas on the grounds that they violated petitioners' Fifth Amendment rights. The trial courts denied the motions to quash on the basis of *Anderson v. Coulter,* 108 Ariz. 388, 499 P.2d 103 (1972), *cert. denied,* 41 U.S.L.W. 3503 (1973).

Petitioners still refused to surrender the films and were found in contempt of court under A.R.S. §12-864. They were sentenced to incarceration, which sentence was stayed upon posting bond and pending collateral attack in this Court. Petitioners now seek a writ of habeas corpus in this Court.

Since petitioners are free on bond, they are in custody for purposes of 28 U.S.C. §§2241(c)(3) and 2254(a). *Hensley v. Municipal Court,* ____U.S.____, 93 S.Ct. 1571 (1973). Since a conviction under A.R.S. §12-864 is unappealable in Arizona, *Anonymous v. Superior Court,* 4 Ariz. App. 170, 418 P.2d 416 (1966), and petitioners have raised their grounds in the trial courts, available state remedies have been exhausted. This Court concludes that it has jurisdiction over the instant case.

In *Anderson v. Coulter, supra,* the Arizona Supreme Court held that a person who exhibits to the public an allegedly obscene film has, by that showing, waived his right to claim his privilege against self incrimination when subpoenaed to produce the film at a prior adversary hearing to determine if it is obscene.

That expression by means of motion pictures is included within the free speech and free press guaranty of the

First and Fourteenth Amendments is established. *Burstyn v. Wilson,* 343 U.S. 495 (1952). It is clear that an exhibitor has a Fifth Amendment right to refuse to produce a film at a prior adversary hearing to determine its obscenity. *Demich, Inc. v. Ferdon,* 426 F.2d 643 (9th Cir. 1970), *rev'd on other grounds,* 401 U.S. 990 (1971). *See also State v. Eros Cinema, Inc.,* 262 La. 706, 264 So.2d 615 (1972), *People v. DeRenzy,* 275 Cal.App.2d 380, 79 Cal. Rptr. 777 (1969). Thus, the holding in *Anderson* declares that an exhibitor who exercises his First Amendment rights by showing the film thereby waives his Fifth Amendment rights. However, it has been declared repeatedly that one constitutional right cannot be surrendered as a penalty for asserting another. *U. S. v. Jackson,* 390 U.S. 570 (1968); *Simmons v. U. S.,* 390 U.S. 377 (1968). *Compare Perry v. Sinderman,* 408 U.S. 593 (1972), *with Lamont v. Postmaster General,* 381 U.S. 301 (1965).

The holding in *Anderson* also creates a result condemned by the United States Supreme Court in *Smith v. California,* 361 U.S. 147 (1959). There the Court invalidated a California obscenity ordinance which permitted conviction without proof of the bookseller's scienter. The Court reasoned that the effect of such strict liability statute would be to force a bookseller to become a censor. A bookseller, apprehensive about the possible obscenity of certain books, would keep them off his shelves. This would result in a limitation of the public's right to access to non-obscene, as well as obscene books. In the instant case, a film exhibitor might refuse to exhibit a film to the public if he feared it might be considered obscene because, by so showing the film, he would waive his Fifth Amendment

rights. Again, as in *Smith v. California, supra,* the result would be that the public's access to films is curtailed.

Respondent cites as authority *Simmons v. U. S., supra,* which held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, this testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. Respondent argues that the hearing at which production of the film was compelled by the subpoena duces tecum should be viewed as either a probable cause hearing or as being similar to a hearing upon a motion to suppress. As a result, respondent says, testimony of the petitioner would be excluded and no prejudice would attach. But it is not testimony which the state seeks at this hearing, but rather the film itself, which represents the body of the evidence to be produced at a later criminal trial for obscenity. This is clear from the City's own state court complaint which prayed "that Respondents be ordered to surrender it (the film) to Petitioner *for possible criminal prosecution . . .*" (Emphasis added).

Next, respondent relies on *Katz v. U. S.*, 389 U.S. 347 (1967) for the proposition that what a person knowingly exposes to the public, even in his own home or office, is not a subject for Fourth Amendment protection. Respondent argues that this same proposition is applicable to the Fifth Amendment because the Fifth Amendment, like the Fourth, deals only with private matters. All that *Katz* says is that if a person makes a statement in public, someone who hears the statement can then repeat it in court in testifying against the accused. *Katz* does not say that the accused himself can be forced to take the stand.

Finally, respondent contends that if an exhibitor cannot be compelled to produce films at prior adversary hearings, it would thwart the entire purpose and thrust of the hearing and give "carte blanche" to an individual commercially exhibiting pornography to continue in his activities. This argument is unpersuasive because the state still has various valid alternative methods to deal with the problem. E.g., *Heller v. New York,* 41 U.S.L.W. 5067 (June 25, 1973); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Demich, Inc. v. Ferdon, supra.*

This Court concludes, therefore, that petitioners are being held in violation of their constitutional rights.

IT IS ORDERED that a writ of habeas corpus issue against respondent, directing that petitioners be released from custody.

DATED this 11th day of July, 1973.

/s/ WALTER E. CRAIG
Walter E. Craig
United States District Judge